

CUSTOMS BULLETIN AND DECISIONS

**Weekly Compilation of
Decisions, Rulings, Regulations, Notices, and Abstracts
Concerning Customs and Related Matters of the
U.S. Customs Service
U.S. Court of Appeals for the Federal Circuit
and
U.S. Court of International Trade**

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This issue contains:

U.S. Customs Service

General Notices

U.S. Court of International Trade

Slip Op. 00-34 Through 00-40

Abstracted Decisions:

Classification: C00/23 Through C00/31

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

General Notices

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 4-2000)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of March 2000 follow. The last notice was published in the CUSTOMS BULLETIN on April 19, 2000.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, 1300 Pennsylvania Avenue, N.W., Ronald Reagan Building, 3rd floor, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Joanne Roman Stump, Chief, Intellectual Property Rights Branch, (202) 927-2330.

Dated: April 24, 2000.

JOANNE ROMAN STUMP
Chief,
Intellectual Property Rights Branch.

The list of recordations follow:

04/03/00
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U.S. CUSTOMS SERVICE
IPR RECORDATIONS ADDED IN MARCH 2000

PAGE	DETAIL
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U.S. CUSTOMS SERVICE
IPR RECORDATIONS ADDED IN MARCH 2000

PAGE 2
DETAIL

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TMN OR WSK	OWNER NAME	REG
TMK0000134	20000315	20090905	DENY	GABRIELLE STUDIO, INC. C/O THE	N
TMK0000135	20000315	20090706	PAPA NACHO'S	PHILLIP V. LOPEZ DBA P.V.L. FOOD	N
TMK0000136	20000315	20090810	HANA	DAE SUNG TRADING CORPORATION	N
TMK0000137	20000315	20040208	BRANDWEEK	ASM COMMUNICATIONS, INC.	N
TMK0000138	20000317	20091116	CHAMPAGNE	AMEX DISTRIBUTING INC.	N
TMK0000139	20000317	20091228	COLINA GOLD	AMEX DISTRIBUTING INC.	N
TMK0000140	20000322	20030819	CERTAIN	BAYER CORPORATION	N
TMK0000141	20000322	20030819	CERTAIN	BAYER CORPORATION	N
TMK0000142	20000322	20030817	CERTAIN	BAYER CORPORATION	N
TMK0000143	20000322	20060312	COMPLEMENT	BAYER CORPORATION	N
TMK0000144	20000322	20030510	CONFIRMATION	BAYER CORPORATION	N
TMK0000145	20000322	20040405	CVM	BAYER CORPORATION	N
TMK0000146	20000322	20011112	RAPIDFILL	BAYER CORPORATION	N
TMK0000147	20000322	20011112	RAPIDFILL	BAYER CORPORATION	N
TMK0000148	20000322	20090322	RAPIDFILL	BAYER CORPORATION	N
TMK0000149	20000322	20090323	RAPIDFILL	BAYER CORPORATION	N
TMK0000150	20000322	20050815	READY SENSOR	BAYER CORPORATION	N
TMK0000151	20000322	20090803	HCI & DESIGN	HARMONY CULTURAL INSTITUTE, INC.	N
TMK0000152	20000322	20091226	FIRE-SAFE	JOHN D. BRUSH & CO., INC.	N
TMK0000153	20000322	20091207	SALT LAKE 2002	SALT LAKE ORGANIZING COMMITTEE	N
TMK0000154	20000323	20050307	IMAGES 70	APP. IMAGING CORPORATION	N
TMK0000155	20000328	20090816	TECHNICALS	PARSONS TECHNOLOGICAL CORPORATION	N
TMK0000156	20000328	20090817	TECHNICALS	PARSONS TECHNOLOGICAL CORPORATION	N
TMK0000157	20000328	20090921	JAGUAR AND DESIGN	FLEET WHOLESALE SUPPLY CO., INC.	N
TMK0000158	20000330	20091005	THE REED-JOSEPH INTERNATIONAL SCARE AWAY SYSTEM & DESIG	R-J INT'L, INC.	N
TMK0000159	20000330	20090803	PETMED	MARK A. GIRONE, DBA PETMED	N
TMK0000160	20000330	20090803	MR. ROMOTE	U.S. ELECTRONICS COMPONENTS CORP	N

SUBTOTAL RECORDATION TYPE 61

TOTAL RECORDATIONS ADDED THIS MONTH 72

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, April 26, 2000.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
*Assistant Commissioner,
Office of Regulations and Rulings.*

PROPOSED REVOCATION OF RULING LETTER AND
TREATMENT RELATING TO CLASSIFICATION OF RUDOLPH
AND SANTA CERAMIC CHIP AND DIP SET

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter and treatment relating to the classification of a Rudolph and Santa Ceramic Chip and Dip Set.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of a Rudolph and Santa Ceramic Chip and Dip Set and any treatment previously accorded by the Customs Service to substantially identical transactions. Comments are invited on the correctness of the intended action.

DATE: Comments must be received on or before June 9, 2000.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: John G. Black, General Classification Branch (202) 927-1317.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L.

103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of a Rudolph and Santa Ceramic Chip and Dip Set. Although in this notice Customs is specifically referring to one ruling, New York Ruling Letter (NY) D84481 dated November 27, 1998, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. This notice will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to this notice.

In NY D84481, issued November 27, 1998, Customs ruled that a Rudolph and Santa Chip and Dip Set was classified in subheading 6912.00.4810, HTSUS, which provides for "Ceramic tableware, kitchenware, other household articles and toilet articles, other than of porcelain or china: Tableware and kitchenware: Other: Other: Other: Other, Suitable for food or drink contact." This ruling letter is set forth in "Attachment A" to this document. Since the issuance of that ruling, Customs has had a chance to reconsider the classification of this merchandise based on the information as to use provided by the importer and from other sources and has determined that the 1998 ruling is in error. We have determined that this Rudolph and Santa Chip and Dip Set is within the class of other festive articles and is properly classified in subheading 9505.10.5060, HTSUS, as "Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Articles for Christmas festivities and parts and accessories thereof: Other: Other: Other."

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to revoke NY D84481 and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed Headquarters Ruling Letter (HQ) 962536 (see "Attachment B" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to modify or revoke any treatment previously accorded by the Customs Service to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: April 25, 2000.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE,

New York, NY, November 27, 1998.

CLA-2-69:RR:NC:2:227 D84481

Category: Classification

Tariff No. 6912.00.4810

MR. DAVID N. MURPHY
GRUNFELD, DESIDERIO, LEBOWITZ & SILVERMAN, LLP
COUNSELORS AT LAW
245 Park Avenue, 33rd Floor
New York, NY 10167-3397

Re: The tariff classification of a ceramic dish set from China.

DEAR MR. MURPHY:

In your letter dated November 6, 1998, on behalf of Cardinal, Inc., you requested a tariff classification ruling. Sample is being returned as requested.

The sample submitted is a decorative ceramic dish set, known as the Rudolph and Santa chip and dip set (style number G5920), which consists of the following:

a) a serving chip dish, measuring approximately 14 inches in length by 3 inches at its highest point. Its exterior surface possesses a Christmas tree, reindeer and candy cane motif in relief with a reindeer-like figurine, measuring about 4 1/4 inches high, that is permanently affixed near the side of the dish.

b) a sleigh-shaped dip dish, measuring about 5 1/4 inches long by 3 inches at its highest point, that is decorated with a motif of candy canes and holly leaves with berries. There is also a Santa figurine, measuring approximately 4 1/4 inches high, which is standing adjacent to the sleigh.

It is noted that the essential character of the set is imparted by the ceramic serving chip dish.

You claim that the instant set should be properly classified under subheading 9505.10.5020, Harmonized Tariff Schedule of the United States (HTS), which provides for other articles for Christmas festivities.

This claim is supported, with regard to the decisions of *Midwest of Cannon Falls v. United States* and *United States v. Carborundum*, in asserting that the subject dish set is apparently designed to be used as a festive article during Christmas not only due to its festive decor (noting HQ 960371 dated April 14, 1998) but also since it is of a class or kind of merchandise that is advertised, marketed, and sold during the Christmas season (the holiday catalog being submitted).

Although the instant merchandise, possessing a functional usage with festive motif, is advertised in the holiday catalog, the set as a whole is not a three-dimensional representation of a festive motif, thereby precluding consideration of classification under subheading 9505.10.5020, HTS.

The applicable subheading for the ceramic chip and dip set will be 6912.00.4810, Harmonized Tariff Schedule of the United States (HTS), which provides for other ceramic tableware * * * other than of porcelain or china * * * suitable for food or drink contact. The rate of duty will be 10.1 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact either National Import Specialist Alice Masterson at 212-466-5892 or National Import Specialist George Kalkines at 212-466-5794.

ROBERT B. SWIERUPSKI,

Director,

National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:CR:GC 962536 JGB
Category: Classification
Tariff No. 9505.10.5020

MR. DAVID M. MURPHY
GRUNFELD, DESIDERIO, LEBOWITZ & SILVERMAN LLP
245 Park Ave.
New York, NY 10167-3397

Re: Revocation of NY D84481; Rudolph and Santa Ceramic Chip and Dip Set; *Midwest of Cannon Falls, Inc. v. United States*.

DEAR MR. MURPHY:

This is in response to your letter of January 22, 1999, on behalf of Cardinal, Inc., which requests reconsideration of New York Ruling Letter (NY) D84481, issued to you on November 27, 1998, concerning the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of a Rudolph and Santa Ceramic Chip and Dip Set.

This letter is to inform you that D84481 no longer reflects the view of the Customs Service concerning the classification of the Rudolph and Santa Ceramic Chip and Dip Set and that the following reflects our position for this product.

Facts:

The Rudolph and Santa Ceramic Chip and Dip Set (style # G5920) consists of the following:

- a ceramic serving chip dish, measuring approximately 14 inches in length by 3 inches at its highest point. Its exterior surface possesses a Christmas tree, reindeer and candy cane motif in relief with a reindeer-like figurine, measuring about 4¼ inches high, that is permanently affixed near the side of the dish.
- a ceramic sleigh-shaped dip dish, measuring about 5¼ inches long by 3 inches at its highest point, that is decorated with a motif of candy canes and holly leaves with berries. There is also a Santa figurine, measuring approximately 4¼ inches high, which is standing adjacent to the sleigh.

Information provided noted that the Rudolph and Santa Ceramic Chip and Dip Set is "marketed and sold through Christmas stores, general merchandise stores that carry seasonal articles, and is also sold through a 1998 holiday catalog."

Issue:

Whether the Rudolph and Santa Ceramic Chip and Dip Set is classified in heading 6912, HTSUS, as other ceramic tableware, or in heading 9505, HTSUS, as a festive article.

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRI.

Heading 6912, HTSUS, provides for "Ceramic tableware, kitchenware, other household articles and toilet articles, other than of porcelain or china." Subheading 6912.00.4810, HTSUS, HTSUS, provides for "Tableware and Kitchenware: Other: Other: Other: Other, Suitable for food or drink contact."

Note 2(k) to Chapter 69, HTSUS, which covers heading 6912, provides that this chapter does not cover "Articles of chapter 95 * * *." Thus, if the subject goods are classifiable under heading 9505, then Note 2(k) to Chapter 69 will preclude classification under heading 6912 and necessitate classification under Chapter 95.

Heading 9505, HTSUS, provides, among other things, for festive, carnival or other entertainment articles. Articles for Christmas festivities are specifically provided for in subheading 9505.10, HTSUS.

In *Midwest of Cannon Falls, Inc. v. United States*, Slip Op. 96-19 (Ct. Int'l Trade, 1996), *aff'd in part, rev'd in part*, 122 F.3d 1423, Appeal Nos. 96-1271, 96-1279 (Fed. Cir. 1997) (hereinafter *Midwest*), the Court addressed the scope of heading 9505, HTSUS, specifically the class or kind of merchandise termed "festive articles," and provided new guidelines for classification of such goods in the heading. In general, merchandise is classifiable as a festive article in heading 9505, HTSUS, when the article, as a whole:

1. Is not predominately of precious or semiprecious stones, precious metal or metal clad with precious metal;
2. Functions primarily as a decoration or functional item used in celebration of, and for entertainment on, a holiday; and
3. Is associated with or used on a particular holiday.

Based upon a review of the articles subject to the *Midwest* decision, Customs is of the opinion that the Court has included within the scope of the class "festive articles," decorative household articles which are representations of an accepted symbol for a recognized holiday, and utilitarian/functional articles that are three-dimensional representations of an accepted symbol for a recognized holiday. See the Informed Compliance Publication on the Classification of Festive Articles published in the CUSTOMS BULLETIN, Volume 32, Numbers 2/3, dated January 21, 1998.

In addition to the criteria listed above, the Court considered the general criteria for classification set forth in *United States v. Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F.2d 373 (1976), cert. denied, 429 U.S. 979 (hereinafter *Carborundum*). Therefore, with respect to decorative and utilitarian articles related to holidays and symbols not specifically recognized in *Midwest* or in the CUSTOMS BULLETIN dated January 21, 1998, Customs will also consider the general criteria set forth in *Carborundum* to determine whether a particular good belongs to the class or kind known as "festive articles." Those criteria include the general physical characteristics of the article, the expectation of the ultimate purchaser, the channels of trade, the environment of sale (accompanying accessories, manner of advertisement and display), the use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use.

An initial issue here is whether the Rudolph and Santa Ceramic Chip and Dip Set constitutes a set for tariff classification purposes, as determined in NY D84481. That decision, in essence, indicated that the serving dish did not qualify as a festive article because it did not constitute a three-dimensional representation of an accepted symbol of the particular holiday; although the sleigh-shaped dip dish with the Santa figurine, as a recognized symbol of the Christmas holiday, did bring that component of the set into the class of festive articles. The ruling stated that "the set as a whole is not a three-dimensional representation of a festive motif, thereby precluding consideration of classification under subheading 9505.10.5020." That decision regarded both articles as a set put up for retail sale and determined that the non-festive component provided the essential character, thereby requiring a classification of the set as ceramic tableware.

We think that the better view of the articles (regardless of the designation provided by the importer) would be as a composite good. We understand that the sleigh/Santa dip dish fits into a slight depression on the chip plate, reinforcing the obvious conclusion that these are two components adapted one to the other which are mutually complementary, so that together they form a whole which would not normally be offered for sale in separate parts. The sleigh/Santa dip dish is identified as providing the essential character of the composite good. As such, it serves to mark or distinguish the good and determine its use. The sleigh/Santa component is three-dimensional, as well as being functional, and its use, to hold a dip, gives a reason to use the whole article and identifies the role of the component in relation to the use of the good. See General Rules of Interpretation 2, 3(a), 3(b); EN (IX) to Rule 3(b) (composite goods); and EN (VIII) to Rule 3(b) (essential character).

In considering the *Midwest* standards, the Rudolph and Santa Ceramic Chip and Dip Set is not predominately of precious or semiprecious stones, precious metal or metal clad with precious metal. The set does appear to be a functional item used in the celebration of a festive occasion.

With respect to the general criteria set forth in *Carborundum* and further considered by the Court, we note that in terms of general physical characteristics, this both decorative

and functional article has been made into festive article by the incorporation of three-dimensional festive images and could no longer be simply identified as a serving set for dips and chips.

The ultimate purchaser would have the expectation of using the article in connection with the celebration of Christmas season. The environment of the sale is established. The use of the article in the same manner as merchandise which defines the class is satisfied in that the article will be used only in connection with Christmas celebrations.

Holding:

The Rudolph and Santa Ceramic Chip and Dip Set is classified in subheading 9505.10.5020, HTSUS, the provision for "Festive, carnival, or other entertainment articles, * * * parts and accessories thereof: Articles for Christmas festivities and parts and accessories thereof: Other: Other, Other."

NY D84481 is hereby revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION AND REVOCATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE CLASSIFICATION OF WOMEN'S SWIMWEAR

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of classification ruling letters and treatment relating to the classification of women's swimwear.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), this notice advises interested parties that Customs intends to modify one ruling letter and revoke a second ruling letter pertaining to the tariff classification of women's swimwear and revoke any treatment previously accorded by Customs to substantially identical merchandise. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before June 9, 2000.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Textile Classification Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, 1300 Pennsylvania Avenue, N.W., Washington D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Josephine Baiamonte, Textile Branch, (202) 927-2394.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L.

103-182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), this notice advises interested parties that Customs intends to modify one ruling letter and revoke a second ruling letter pertaining to the tariff classification of women's swimwear. Although in this notice Customs is specifically referring to two rulings, Headquarters Ruling Letter (HQ) 952907, dated January 29, 1993, and HQ 952584, dated December 8, 1992, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule. Any person involved with substantially identical merchandise should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical merchandise or of a specific ruling not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of the final decision of this notice.

In HQ 952907, the classification of extra pieces of women's top and bottom swimwear garments imported in the same shipment with equal

numbers of women's top and bottom swimwear garments was determined to be classified in heading 6112, HTSUS, as women's swimwear. This ruling letter is set forth in "Attachment A" to this document. In HQ 952584, the classification of three sets of women's swimwear garments were determined to be in heading 6112, HTSUS, based on the *bona fide* intent of the importer at the time of importation. This ruling letter is set forth in "Attachment B" to this document. Since the issuance of these rulings, Customs has had a chance to review the classification of this merchandise and has determined that the classification determination in HQ 952907 is in error and that the analysis in HQ 952584 requires modification.

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to revoke HQ 952907 and modify HQ 952584 and any other rulings not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed Headquarters Ruling Letters (HQ) 963861 and HQ 963862 (see "Attachment C" and "Attachment D" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical merchandise. Before taking this action, consideration will be given to any written comments timely received.

Dated: April 20, 2000.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 29, 1993.
CLA-2 CO:R:C:T 952907 HP
Category: Classification
Tariff No. 6112.41.0010

MR. WILLIAM F. SULLIVAN
SPECIAL SERVICES MANAGER
MSAS CUSTOMS LOGISTICS, INC.
150-16 132nd Avenue
Jamaica, NY 11434

Re: Mix and match women's swimwear imported as separates. HRL 952584 followed.

DEAR MR. SULLIVAN:

This is in reply to your letter of August 24, 1992. That letter concerned the tariff classification, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of ladies' swim suits, produced in Hong Kong. Please reference your client New Hampton, Inc., I.D. No. 13-3422220.

Facts:

The merchandise at issue consists of women's mix and match swimwear. Seven knit samples were submitted, all composed of 80% nylon and 20% spandex. Style S93-804-24 is a bra top with a hook closure and detachable shoulder straps. Style S93-804-22 is a crop-like garment. Styles S93-804-21 and S93-804-19 are solid (different) colored bikini bottoms with gussets. Style S93-804-23 is a bra top with shoulder straps and strap closures. Style S93-804-20 is a bikini bottom with a waistband and gusset. The seventh sample, lacking a style number, is a crop-like top design. Styles -21, -19 and -23 match as to fabric and color. The seventh sample matches the multi-colored bottoms -19 and -20. You state that the garments are mix and match swimwear which will be packaged separately, but sold at retail as swimsuits. The tops and bottoms will not be imported in equal numbers.

Issue:

Whether the mix and match garments are classifiable as swimwear or as separates under the HTSUSA?

Law and Analysis:

In HRL 952584 of December 8, 1992, we classified merchandise identical to the garments at issue, except that the mix and match tops and bottoms were imported in equal quantities. That ruling held that where the "bona fide intent of the importer [is] to sell the separately packaged components as sets," and that the separate packaging is to allow "the consumer to personally select the top and bottom combinations which will give the ideal fit," the merchandise is classifiable under heading 6112, HTSUSA, as women's swimwear. See also HRL 088423 of May 20, 1991.

It is our opinion that to classify the instant merchandise differently from that in HRL 952584 merely because this merchandise is imported in differing quantities is unwarranted. As opposed to Yoga Asana suit components, in which tops or bottoms are occasionally sold separately for replacement purposes, the components at issue are invariably sold as sets. See HRL 083458 of August 31, 1990. Therefore, as in HRL 952584, classification as women's swimwear is appropriate.

Holding:

As a result of the foregoing, the instant merchandise is classified under subheading 6112.41.0010, HTSUSA, textile category 659, as women's swimwear of synthetic fibers. The applicable rate of duty is 26.5 percent ad valorem. The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent negotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the Status Report On Current Import Quotas (Restraint Levels), an issuance of the U.S. Customs Service, which is updated weekly and is available at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, December 8, 1992.

CLA-2 CO:R:C:T 952584 jb
Category: Classification
Tariff No. 6112.41.0010

JAMES F. O'HARA, ESQUIRE
STEIN SHOSTAK SHOSTAK & O'HARA
3580 Wilshire Boulevard
Los Angeles, CA 90010-2597

Re: Women's swimwear; classification based on bona fide intention of the importer at time of importation to sell components as a complete suit; 6112.41.0010, HTSUSA.

DEAR MR. O'HARA:

This is in response to your letter dated August 10, 1992, on behalf of your client, Krystal K. International Inc., regarding the classification of women's swimsuits. Samples were provided to this office and will be returned under separate cover.

Facts:

The subject swimwear are two-piece bikini swimsuits composed of 83 percent nylon and 17 percent spandex knit fabric. The outer shell of one piece is either the same color and pattern, or of a coordinated color and pattern, as a matching second piece. The swimsuits will be imported with the tops and bottoms separately packaged, but in identical quantities of coordinated tops and bottoms which will be sold as sets.

The three sample bottom pieces, designated with a (B) in the model number, are composed of knit nylon and spandex with a polyester lined front panel and crotch. The three sample top pieces, designated with a (T) in the model number, are also composed of nylon and spandex and have a front panel which covers the bosom. All are secured in the back with a one-inch square, clear, plastic fastener.

The three sample sets are as follows:

1. Model LS(B)000 and Model LS(T)000 the top is fashioned in a bandeau style.
2. Model LS(B)001 and Model LS(T)001 the bottom piece is decorated with a ruffled panel of nylon and spandex; the top piece is a short crop tank-top style with lace-up detailing in the front.
3. Model LS(B)002 and Model LS(T)002 the top is fashioned in a bandeau style.

Issue:

Whether the submitted samples, which will be imported in identical quantities of separately packaged tops and bottoms of the same color or pattern coordinated, and sold as sets, are properly classifiable as women's swimwear, in subheading 6112.41.0010, HTSUSA?

Law and Analysis:

Classification of merchandise under the HTSUSA is governed according to the General Rules of Interpretation (GRI). GRI 1 requires that classification be determined according to the terms of the headings and any relative section or chapter notes, taken in order. Where goods cannot be classified solely on the basis of GRI 1, the remaining GRI will be applied in the order of their appearance.

At issue is whether this merchandise, upon entering the United States, is to be classified based upon its condition as imported, i.e., either by separate packaging of the top and bottom pieces, or based upon the way in which it is to be put up for retail sale to the consumer, i.e., as a bikini set.

A similar issue was discussed in Customs Memorandum 085944, dated May 10, 1991, therein it was determined that:

As a result, whether sets of garments which are not packed together in such a manner that they are readily identifiable as suits at the time of importation are classifiable as such depends on the intent of the importer. If, at the time of importation, the importer has the bona fide intention to sell the suit components as suits, as evidenced by the documentation in the entry package, then the merchandise, in the absence of evidence to the contrary, is classifiable as suits. If, at the time of importation, the importer has the bona fide intention to sell the garment components separately, as evidenced by the

documentation in the entry package, in the absence of evidence to the contrary, the garments are classifiable separately.

See also, HQ 088423, dated May 20, 1991. The importer states that the separate packaging of the matching components enhances the marketability of the bathing suits, enabling the consumer to purchase the best fitting swimwear by selecting different sizes for the bikini top and bottom, as required. This statement serves to show the bona fide intention of the importer to sell the separately packaged components as sets, allowing the consumer to personally select the top and bottom combinations which will give the ideal fit. Based upon this bona fide intent of the importer and the cited rulings, the merchandise is classified in subheading 6112.41.0010, HTSUSA, under the provision for women's swimwear.

Holding:

Assuming the requisite evidence of a bona fide intention to sell the merchandise as sets is present at the time of importation, the three sample sets, Model LS(B)000 and LS(T)000, Model LS(B)001 and LS(T)001, and Model LS(B)002 and LS(T)002, are classified under subheading 6112.41.0010, HTSUSA, which provides for women's knit swimwear of synthetic fabric containing by weight 5 percent or more elastomeric yarn or rubber thread. The applicable rate of duty is 26.5 percent ad valorem and the textile category is 659.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent negotiations and changes, to obtain the most current information available, we suggest your client check, close to the time of shipment, the Status Report On Current Quotas (Restraint Levels), an issuance of the U.S. Customs Service, which is updated weekly and is available at the local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, your client should check the local Customs office prior to importing the merchandise to determine the current status of any import restraints of requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.
CLA-2 RR:CR:TE 963861 jb
Category: Classification
Tariff No. 6114.30.3070 and 6112.41.0010

MR. SULLIVAN
SPECIAL SERVICES MANAGER
MSAS CUSTOMS LOGISTICS, INC.
150-16 132nd Avenue
Jamaica, NY 11434

Re: Classification of women's swimwear tops and bottoms; mix and match women's swimwear imported as separates.

DEAR MR. SULLIVAN:

On January 29, 1993, this office issued to you, Headquarters Ruling Letter (HQ) 952907, on behalf of your client, New Hampton Inc., addressing the classification under the Harmonized Tariff Schedule of the United States (HTSUS), for women's knit two-piece swimwear to be sold as mix and match coordinates. The tops and bottoms are not imported in equal numbers. This letter is to inform you that upon review of that ruling we have determined that the classification of the unequal numbers of tops and bottoms in heading 6112,

HTSUS, as women's swimwear is incorrect. The correct classification for that merchandise is in heading 6114, HTSUS, as other garments, pursuant to the analysis which follows below.

Facts:

The merchandise at issue consists of women's mix and match swimwear. Seven knit samples were submitted, all composed of 80 percent nylon and 20 percent spandex. Style S93-804-24 is a bra top with a hook closure and detachable shoulder straps. Style S93-804-22 is a crop-like garment. Styles S93-804-21 and S93-804-19 are solid (different) colored bikini bottoms with gussets. Style S93-804-23 is a bra top with shoulder straps and strap closures. Style S93-804-20 is a bikini bottom with a waistband and gusset. The seventh sample, lacking a style number, is a crop-like top design. Styles -21, -19, and -23 match as to fabric and color. The seventh sample matches the multi-colored bottoms -19 and 20.

In requesting HQ 952907, you stated that the garments are mix and match swimwear which would be packaged separately, but sold at retail as swimsuits. The tops and bottoms would not be imported in equal numbers.

Issue:

What is the proper classification for these garments when packaged in unequal numbers in the same shipment or imported in separate shipments?

Law and Analysis:

Classification of merchandise under the HTSUSA is governed according to the General Rules of Interpretation (GRI). GRI 1 requires that classification be determined according to the terms of the headings and any relative section or chapter notes. Where goods cannot be classified solely on the basis of GRI 1, the remaining GRI will be applied in the order of their appearance.

Heading 6112, HTSUS, provides for, among other things, swimwear. The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN) to that heading state that heading 6112, HTSUS, includes, "Swimwear (knitted or crocheted one-piece or two-piece bathing costumes, swimming shorts and trunks, whether or not elastic)". The word "bikini", as defined by the *Essential Terms of Fashion* by Charlotte Mankey Calasibetta, 1986, at 214, states, "Women's brief two-piece swimsuit with tiny brassiere top and brief pants cut below navel, narrow at sides * * *". Additionally, the *Fashion Dictionary*, by Mary Brooks Picken, 1973, at 21, defines "bikini" as a "very brief two-piece bathing suit * * *". It is clear both by the explicit terms of the EN to heading 6112, HTSUS, and the lexicographic sources referenced above that the term "bikini" denotes a two-piece, top and bottom garment. As such, when classifying this merchandise in its condition as imported, by its very definition, a "bikini" must consist of both an upper and lower body garment.

Similarly, in HQ 088635, dated May 24, 1991, and HQ 089367, dated July 31, 1991, Customs addressed the meaning of the term "pajamas" and concluded that no support could be found for the proposition that the common meaning of the term included the individual components of a pajama set standing alone. We find that basing classification of these garments, i.e., whether as swimwear or pajamas, on a determination that the merchandise is comprised of two pieces, is both logical and consistent with the EN to the tariff and the common commercial meaning of this merchandise.

Accordingly, in reaching a decision on the classification of the garments at issue we must examine how they will be imported. That is, the classification of these garments as swimwear turns on whether the top and bottom garments will be imported in equal numbers in the same shipment. The *bona fide* intent of the importer is not determinative of the classification.

In Customs ruling, HQ 956492, dated September 19, 1994, Customs determined that pajamas are to be treated as composite goods. The rationale given was that the components are adapted to each other, they are mutually complementary, and they form a whole that would not normally be offered for sale in separate parts.

As was stated in HQ 956202, dated September 29, 1994, regarding the classification of sleepwear garments which were being imported in unequal amounts and consisted of a top and bottom component, "classification based upon the doctrine of condition as imported is a basic tenet of tariff classification". Quoting the court in *Donalds Ltd., Inc. v. United States*, 32 Cust. Ct. 310, 314, C.D. 1619 (1954), HQ 956202 stated that, "* * *" in determining the proper classification applicable to imported articles, the actual nature of the article of commerce, or commercial entity, involved must be taken as the determinant."

Based upon their condition at the time of importation, same shipments of equal numbers of matching swimwear tops and bottoms will be viewed by Customs as shipments of composite goods that form a whole which are not normally sold as separate parts and are commercially known as swimwear. Thus, garments in such shipments will be classified as swimwear of heading 6112, HTSUSA, if of knit fabric or of heading 6211, HTSUS, if of woven fabric. Please note, that by the terms "matching", Customs is making reference not only to design, style and coloring, but also to size. In regard to sizing, provided the bulk of the shipment consists of garments (tops and bottoms) which are matched as to size, a slight variation in sizing between a limited number of tops and bottoms will not preclude classification as swimwear.

Accordingly, if a shipment consists of unequal numbers of tops or bottoms (i.e., extra pieces of either tops or bottoms), those extra pieces may not be classified as swimwear but will be classified separately as other garments of heading 6114, HTSUS, or heading 6211, HTSUS, depending upon fabric construction. It thus follows that separate shipments of either tops or bottoms only, will similarly be classified as other garments of heading 6114, HTSUS, or heading 6211, HTSUS.

Holding:

HQ 952907 is revoked.

Equal numbers of matching tops and bottoms of the subject merchandise, imported in the same shipment, are classified in subheading 6112.41.0010, HTSUSA, which provides for track suits, ski-suits and swimwear, knitted or crocheted: women's or girls' swimwear: of synthetic fibers: of fabric containing by weight 5 percent or more elastomeric yarn or rubber thread: women's. The applicable general column one rate of duty is 25.5 percent *ad valorem* and the textile quota category is 659.

Extra pieces of either tops or bottoms of the subject merchandise contained in the same shipment, or tops or bottoms imported separately in separate shipments, are classified in subheading 6114.30.3070, HTSUSA, which provides for, other garments, knitted or crocheted: of man-made fibers: other: other: women's or girls'. The applicable general column one rate of duty is 15.4 percent *ad valorem* and the textile quota category is 659.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent negotiations and changes, we suggest that your client check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an issuance of the U.S. Customs Service, which is updated weekly and is available at the local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, your client should contact the local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.
CLA-2 RR:CR:TE 963862 jb
Category: Classification
Tariff No. 6112.41.0010 and 6114.30.3070

MR. O'HARA, ESQ.
STEIN SHOSTAK SHOSTAK & O'HARA
3580 Wilshire Boulevard
Los Angeles, CA 90010-2597

Re: Classification of women's swimwear tops and bottoms.

DEAR MR. O'HARA:

On December 8, 1992, this office issued to you, on behalf of your client, Krystal K. International Inc., Headquarters Ruling Letter (HQ) 952584, addressing the classification under the Harmonized Tariff Schedule of the United States (HTSUS), for women's knit two-piece swimwear to be sold as mix and match coordinates. This letter is to inform you that although the classification determination in that ruling is correct, upon review of that ruling we have determined that the analysis portion of that ruling requires some modification. Accordingly, we are modifying that ruling pursuant to the analysis which follows below.

Facts:

The subject merchandise consists of two-piece bikini swimsuits composed of 83 percent nylon and 17 percent spandex knit fabric. The outer shell of one piece is either the same color and pattern, or of a coordinated color and pattern, as a matching second piece. The swimsuits will be imported with the tops and bottoms separately packaged, but in identical quantities of coordinated tops and bottoms which will be sold as sets.

The three sample bottom pieces, designated with a (B) in the model number, are composed of knit nylon and spandex with a polyester lined front panel and crotch. The three sample top pieces, designated with a (T) in the model number, are also composed of nylon and spandex and have a front panel which covers the bosom. All are secured in the back with a one-inch square, clear, plastic fastener.

The three samples are as follows:

1. Model LS (B) 000 and Model LS (T) 000: the top is fashioned in a bandeau style
2. Model LS (B) 001 and Model LS (T) 001: the bottom piece is decorated with a ruffled panel of nylon and spandex; the top piece is a short crop tank top style with lace-up detailing in the front
3. Model LS (B) 002 and Model LS (T) 002: the top is fashioned in a bandeau style.

Issue:

What is the proper classification for these garments when packaged in the same shipment?

Law and Analysis:

Classification of merchandise under the HTSUSA is governed according to the General Rules of Interpretation (GRI). GRI 1 requires that classification be determined according to the terms of the headings and any relative section or chapter notes. Where goods cannot be classified solely on the basis of GRI 1, the remaining GRI will be applied in the order of their appearance.

Heading 6112, HTSUS, provides for, among other things, swimwear. The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN) to that heading state that heading 6112, HTSUS, includes, "Swimwear (knitted or crocheted one-piece or two-piece bathing costumes, swimming shorts and trunks, whether or not elastic)". The word "bikini", as defined by the *Essential Terms of Fashion* by Charlotte Mankey Calasibetta, 1986, at 214, states, "Women's brief two-piece swimsuit with tiny brassiere top and brief pants cut below navel, narrow at sides * * *". Additionally, the *Fashion Dictionary*, by Mary Brooks Picken, 1973, at 21, defines "bikini" as a "very brief two-piece bathing suit * * *". It is clear both by the explicit terms of the EN to heading 6112, HTSUS, and the lexicographic sources referenced above that the term "bikini" denotes a two-piece, top and

bottom garment. As such, when classifying this merchandise in its condition as imported, by its very definition, a "bikini" must consist of both an upper and lower body garment.

Similarly, in HQ 088635, dated May 24, 1991, and HQ 089367, dated July 31, 1991, Customs addressed the meaning of the term "pajamas" and concluded that no support could be found for the proposition that the common meaning of the term included the individual components of a pajama set standing alone. We find that basing classification of these garments, i.e., whether as swimwear or pajamas, on a determination that the merchandise is comprised of two pieces, is both logical and consistent with the EN to the tariff and the common commercial meaning of this merchandise.

Accordingly, in reaching a decision on the classification of the garments at issue we must examine how they will be imported. That is, the classification of these garments as swimwear turns on whether the top and bottom garments will be imported in equal numbers in the same shipment. The *bona fide* intent of the importer, as was erroneously indicated in HQ 952584, is not determinative of the classification. Additionally, Customs Memorandum 085944, dated May 10, 1991, which was referenced in HQ 952584, is not applicable to swimwear. That memorandum addressed suits which are clearly different garments.

In Customs ruling, HQ 956492, dated September 19, 1994, Customs determined that pajamas are to be treated as composite goods. The rationale given was that the components are adapted to each other, they are mutually complementary, and they form a whole that would not normally be offered for sale in separate parts.

As was stated in HQ 956202, dated September 29, 1994, regarding the classification of sleepwear garments which were being imported in unequal amounts and consisted of a top and bottom component, "classification based upon the doctrine of condition as imported is a basic tenet of tariff classification". Quoting the court in *Donalds Ltd., Inc. v. United States*, 32 Cust. Ct. 310, 314, C.D. 1619 (1954), HQ 956202 stated that " * * * in determining the proper classification applicable to imported articles, the actual nature of the article of commerce, or commercial entity, involved must be taken as the determinant."

Based upon their condition at the time of importation, same shipments of equal numbers of matching swimwear tops and bottoms will be viewed by Customs as shipments of composite goods that form a whole which are not normally sold as separate parts and are commercially known as swimwear. Thus, garments in such shipments will be classified as swimwear of heading 6112, HTSUSA, if of knit fabric or of heading 6211, HTSUS, if of woven fabric. Please note, that by the terms "matching", Customs is making reference not only to design, style and coloring, but also to size. In regard to sizing, provided the bulk of the shipment consists of garments (tops and bottoms) which are matched as to size, a slight variation in sizing between a limited number of tops and bottoms will not preclude classification as swimwear.

Accordingly, if a shipment consists of unequal numbers of tops or bottoms (i.e., extra pieces of either tops or bottoms), those extra pieces may not be classified as swimwear but will be classified separately as other garments of heading 6114, HTSUS, or heading 6211, HTSUS, depending upon fabric construction. It thus follows that separate shipments of either tops or bottoms only, will similarly be classified as other garments of heading 6114, HTSUS, or heading 6211, HTSUS.

Holding:

HQ 952584 is hereby modified pursuant to the analysis set forth above.

Equal numbers of matching tops and bottoms of the subject merchandise, imported in the same shipment, are classified in subheading 6112.41.0010, HTSUSA, which provides for track suits, ski-suits and swimwear, knitted or crocheted: women's or girls' swimwear: of synthetic fibers: of fabric containing by weight 5 percent or more elastomeric yarn or rubber thread: women's. The applicable general column one rate of duty is 25.5 percent *ad valorem* and the textile quota category is 659.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent negotiations and changes, we suggest that your client check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an issuance of the U.S. Customs Service, which is updated weekly and is available at the local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, your client should contact the

local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements

JOHN DURANT,
Director,
Commercial Rulings Division.

MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO CLASSIFICATION OF VALERIAN HERBAL TABLETS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of classification ruling letter and revocation of treatment relating to the classification of valerian herbal tablets.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling letter, NY A82970, dated May 10, 1996, pertaining to the tariff classification of valerian herbal tablets and revoking any treatment previously accorded by the Customs Service to substantially identical transactions. Notice of the proposed modification and revocation was published in the CUSTOMS BULLETIN of March 15, 2000, Vol. 34, No. 11. No comments were received in response to the notice.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after July 10, 2000.

FOR FURTHER INFORMATION CONTACT: Peter T. Lynch, General Classification Branch 202-927-1396.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's

responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met. Pursuant to Customs obligations, a notice of proposed modification of New York Ruling Letter (NY) A82970, dated May 10, 1996, was published in the CUSTOMS BULLETIN of March 15, 2000, Vol. 34, No. 11. No comments were received in response to the notice.

As stated in the proposed notice, this modification and revocation of treatment will cover any rulings on this issue which may exist but have not been specifically identified. Any party who has received an interpretative ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during the notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's failure to advise the Customs Service of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to the effective date of this final decision.

In NY A82970, dated May 10, 1996, the classification of a product commonly referred to as valerian herbal tablets was determined to be in heading 3004.90.9030, HTSUS. Since the issuance of that ruling, Customs has had a chance to review the classification of this merchandise and has determined that the classification is in error.

Customs, pursuant to 19 U.S.C. 1625(c)(1), is modifying NY A82970, and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 963749 (see "Attachment" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is

revoking any treatment previously accorded by the Customs Service to substantially identical transactions.

Dated: April 20, 2000.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, April 20, 2000.

CLA-2 RR:CR:GC 963749ptl
Category: Classification
Tariff No. 2106.90.9998

MR. MIKE NACACHIAN
NAKA SALES LTD.
53 Queens Plate Drive, Unit #3
Etobicoke, Ontario, Canada M9W 6P1

Re: Valerian Herbal Tablets; NY A82970 Modified; HQ 083000, 952278, 962335, 953679.

DEAR MR. NACACHIAN:

In response to your letter dated April 15, 1996, the Director, Customs National Commodity Specialist Division, New York, issued you New York Ruling Letter (NY) A82970 on May 10, 1996, which addressed the tariff classification of several articles under the Harmonized Tariff Schedule of the United States (HTSUS). That ruling classified Valerian Herbal Tablets in subheading 3004.90.9030, HTSUS, which provides for medicaments * * * consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms or packings for retail sale * * * other * * * other * * * medicaments primarily affecting the central nervous system * * * anticonvulsants, hypnotics and sedatives. We have reviewed this ruling and determined that NY A82970 incorrectly classified the Valerian Herbal Tablets. Classifications of the other articles in that ruling are not affected by this ruling.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed modification of NY A82970 was published on March 15, 2000, in the CUSTOMS BULLETIN, Volume 34, Number 11. No comments were received in response to the notice.

Facts:

The merchandise under consideration, Valerian Herbal Tablets, is described in the ruling request as being a "health food supplement for human use". The Valerian Herbal Tablets are white disks said to contain valerian root extract and hop extract. The product is described as a sleeping aid, with a recommended dosage of two tablets shortly before going to bed.

Issue:

What is the classification of Valerian Herbal Extract in tablet form?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRI's). The systematic detail of the HTSUS is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section

or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied in order.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of these headings. See T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The headings under consideration are as follows:

1302	Vegetable saps and extracts; pectic substances, pectinates and pectates; agar-agar and other mucilages and thickeners, whether or not modified, derived from vegetable products:
	Vegetable saps and extracts:
1302.19	Other:
	Ginseng; substances having anesthetic, prophylactic or therapeutic properties:
	" " " " " "
1302.19.40	Other:
1302.19.4040	Other:
2106	Food preparations not elsewhere specified or included:
	" " " " " "
2106.90	Other:
	Other:
	Other:
	Other:
	Other:
2106.90.9998	Other
3004	Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms or packings for retail sale:
	" " " " " "
	Other
3004.90	Other
	" " " " " "
	Medicaments primarily affecting the central nervous system:
	" " " " " "
3004.90.9030	Anticonvulsants, hypnotics and sedatives.

We first consider heading 1302, HTSUS, for classification of the merchandise, based upon the language of the heading which reads: "Vegetable saps and extracts * * * whether or not modified, * * *." However, the ENs to heading 1302 state that "The vegetable saps and extracts of this heading are generally raw materials for various manufactured products. They are excluded from the heading when, because of the addition of other substances, they have the character of food preparations, medicaments, etc." Therefore, it is not only the addition of substances to extracts, but, rather the condition of the final product that is determinative of classification. In this article, not only has hop extract been added, but the valerian extract has been processed into tablet form. Thus, the article can no longer be considered a raw material and is not eligible for classification in heading 1302.

With regard to classification in heading 3004, HTSUS, Customs notes that it has consistently rejected the contention that herbal products are medicaments of heading 3004, HTSUS, stating that, in accordance with the language of EN 30.04, if a product contains parts of plants mixed with other substances and is used to promote general health and well-being it is not a medicament of heading 3004, HTSUS, but rather a food supplement of heading 2106, HTSUS. Customs has also maintained that 3004 excludes products which are put up for the purpose of maintaining health or well-being, but which have no indication as to use for the prevention or treatment of any disease or ailment. See Headquarters Ruling Letters (HQ) 083000, issued September 19, 1990; 952278, dated January 26, 1993 and 962335, dated February 3, 2000. No evidence has been provided that the Valerian Herb- al Tablets are intended to be used for therapeutic or prophylactic purposes, a requirement

for classification in heading 3004, HTSUS. Accordingly, we cannot classify the article in heading 3004.

In HQ 953679, dated February 3, 1994, Customs ruled that Valerian Root Extract described as "a capsule of valeric acids in a base of wild East Indian Valerian root" was classified in heading 2106, HTSUS. The subject Valerian Herbal extract is a similar product to the article in that ruling.

For the above reasons, the Valerian Herbal Extract is properly classified in subheading 2106.90.9998, HTSUS, as a food preparation not elsewhere specified or included, * * *, other.

Holding:

Valerian Herbal Extract in tablet form is classified in subheading 2106.90.9998, HTSUS, which provides for food preparations not elsewhere specified or included: other: other: other: other: other: other: other.

NY A82970, dated May 10, 1996, is modified in accordance with this ruling. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF ULTRA WHITE CONFECTIONER'S COATING

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of a tariff classification ruling letter and the revocation of treatment relating to the classification of an Ultra White Confectioner's Coating.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying New York Ruling Letter (NYRL) D82864, dated October 23, 1998, and revoking any treatment previously accorded by Customs to substantially identical transactions, concerning the tariff classification of an Ultra White Confectioner's Coating FE52E under the Harmonized Tariff Schedule of the United States (HTSUS). Notice of the proposed modification was published in the CUSTOMS BULLETIN, Vol. 34, No. 12, dated March 22, 2000. No comments were received.

FOR FURTHER INFORMATION CONTACT: Norman W. King, General Classification Branch (202) 927-1109.

EFFECTIVE DATE: This notice is effective for merchandise entered or withdrawn from warehouse for consumption on or after July 10, 2000.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L.

103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met. Pursuant to Customs obligations, a notice of proposed modification of NYRL D82864 was published in the CUSTOMS BULLETIN, Vol. 34, No. 12, dated March 22, 2000. No comments were received in response to the notice.

As stated in the proposed notice this modification action will cover any rulings on this issue which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during the notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

In NYRL D82864, dated October 23, 1998, we held that one of the products described as FE52E Ultra White Confectioner's Coating was classified in subheading 2106.90.8200, HTSUS, as other food preparations not elsewhere specified or included, containing over 10 percent by weight of milk solids. Customs is now of the opinion, that the Ultra White Coating is classified in subheadings 2106.90.64 or 2106.90.66,

HTSUS, tariff rate quota provisions, as other food preparations not elsewhere specified or included, other dairy products containing over 10 percent by weight of milk solids.

Customs, pursuant to 19 U.S.C. 1625(c)(1), is modifying NYRL D82864 and revoking any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in an Attachment to this document, Headquarters Ruling Letter 963203. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Dated: April 25, 2000.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, April 25, 2000.
CLA-2 RR:CR:GC 963203K
Category: Classification
Tariff No. 2106.90.6400 and 2106.90.6600

MR. CLAUDE SCHELLENBERGER
MAX FELCHIN, INC.
Bahnhofstrasse 63
CH-6431 Schwyz, Switzerland

Re: Modification of New York Ruling Letter (NYRL) D82864; FE52E Ultra White Confectioner's Coating.

DEAR SIR:

In response to your letter dated September 23, 1998, on October 23, 1998, Customs issued NYRL D82864, concerning the classification of several products, one of which was described as FE52E Ultra White Confectioner's Coating that was classified in subheading 2106.90.8200, HTSUS, as other food preparations not elsewhere specified or included, containing over 10 percent by weight of milk solids. This letter is to inform you that NYRL D82864 no longer reflects the views of the Customs Service concerning the classification of FE52E Ultra White Confectioner's Coating. Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of proposed modification of NYRL D82864 was published in the CUSTOMS BULLETIN, Vol. 34, No. 12, dated March 22, 2000. No comments were received. The following reflects our position for this product.

Facts:

Ultra White, White Coating FE52E, is described in NYRL D82864 as containing 40 percent sugar, 37 percent hardened vegetable fat, 12 percent skimmed milk powder, 6 percent dextrose, 5 percent whole milk powder with a milk fat content of 1.4 percent, and traces of vanillin and lecithin.

Issue:

What is the proper classification of the product described as FE52E?

Law and Analysis:

In Headquarters Ruling Letter (HRL) 960017, dated July 23, 1998, published pursuant to 19 USC 1625 in CUSTOMS BULLETIN Vol. 32, No. 32, dated August 12, 1998, Customs modified NYRL A80434 for a similar product (FE51E) and classified the product, in subheadings 2106.90.64, and 2106.90.66, HTSUS, as other food preparations not elsewhere specified or included, other dairy products containing over 10 percent by weight of milk solids, subject to tariff rate quotas. This ruling did not specifically modify or revoke treatment previously accorded by Customs to substantially identical merchandise or covered by other rulings that were not specifically modified or revoked by HRL 960017. Accordingly, this decision specifically modifies NYRL D82864, and effectively modifies or revokes any prior rulings or prior treatment extended to identical merchandise covered by HRL 960017 and this ruling letter.

For purposes of clarity, we repeat the LAW AND ANALYSIS of HRL 960017 as follows:

Additional U.S. Note 1 of Chapter 4, HTSUS, states that:

For the purposes of this schedule, the term "dairy products described in additional U.S. note 1 to chapter 4" means any of the following goods: malted milk, and articles of milk or cream (except (a) white chocolate and (b) inedible dried milk powders certified to be used for calibrating infrared milk analyzers); articles containing over 5.5 percent by weight of butterfat which are suitable for use as ingredients in the commercial production of edible articles (except articles within the scope of other import quotas provided for in additional U.S. notes 2 and 3 to chapter 18); or, dried milk, whey or buttermilk (of the type provided for in subheadings 0402.10, 0402.21, 0403.90 or 0404.10) which contains not over 5.5 percent by weight of butterfat and which is mixed with other ingredients, including but not limited to sugar, if such mixtures contain over 16 percent milk solids by weight, are capable of being further processed or mixed with similar or other ingredients and are not prepared for marketing to the ultimate consumer in the identical form and package in which imported.

Subheadings 2106.90.64 and 2106.90.66, HTSUS, provide for food preparations not elsewhere specified or provided for, other dairy products described in Additional U.S. Note 1 to Chapter 4. A "dairy product described in Additional U.S. Note 1 to Chapter 4" may be an article falling into any of three classes of merchandise described therein: malted milk and articles of milk or cream, certain articles containing over 5.5 percent butterfat, and, what is relevant here, "dried milk, whey or buttermilk (of the type provided for in subheadings 0402.10, 0402.21, 0403.90, or 0404.10) which contains not over 5.5 percent by weight of butterfat and which is mixed with other ingredients, including but not limited to sugar, if such mixtures contain over 16 percent milk solids by weight, are capable of being further processed or mixed with similar or other ingredients and are not prepared for marketing to the ultimate consumer in the identical form and package in which imported." FE51E Ultra White falls into this third category of articles.

FE51E Ultra White is composed of dried skimmed milk powder, a product of subheading 0402.10, that is mixed with other ingredients. It contains over 16 percent milk solids by weight (12 percent skimmed milk powder and 5 percent whole milk powder), is capable of being further processed or mixed with similar or other ingredients, and is not prepared for marketing to the ultimate consumer in the identical form and package in which imported. The terms "capable of being further processed * * *" "prepared for marketing to the ultimate consumer * * *", and "ultimate consumer", are defined in Section IV, Additional U.S. Notes 2(b), (c), and (d), HTSUS. Those definitions are applicable for FE51E Ultra White. The product is "capable of being further processed * * *" because it is a solid material, and must be heated to change it to a fluid consistency before it is used. It is, therefore, "in such condition * * *" as to be subject to any additional preparation, treatment or manufacture * * *. It is not prepared for marketing to the ultimate consumer because it will be sold to pastry chefs and confectioners, neither of which are considered an "ultimate consumer" by Section IV, Additional U.S. Note 2(d), HTSUS.

Subheadings 2106.90.64 and 2106.90.66 fall under the superior heading for "other, dairy products described in Additional U.S. Note 1 to Chapter 4." In contrast, 2106.90.82, is the residual subheading under an "other * * * other" subheading. Clearly, 2106.90.64 and 2106.90.66 are the more demanding, and therefore more specific tariff provisions. If the product meets the requirements for classification in either of these two subheadings, it must be classified there and we believe that it does.

Holding:

FE52E Ultra White is substantially identical to the product FE51E, as described in HRL 960017, and it is classified as other food preparations not elsewhere specified or included, other dairy products containing over 10 percent by weight of milk solids, in subheading 2106.90.64, HTSUS, if within the quantitative limitations of Additional U.S. Note 10 to Chapter 4. If the quantitative limitations of the Note have been reached, the product is classified in subheading 2106.90.66, HTSUS.

NYRL D82864, dated October 23, 1998, is modified. HRL 960017 is followed.

In accordance with 19 U.S.C. 1625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO THE CLASSIFICATION OF A WOMAN'S KNIT TOP

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of classification ruling letter and treatment relating to the classification of a woman's knit top.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), this notice advises interested parties that Customs is revoking a ruling letter pertaining to the tariff classification of a woman's knit top and revoking any treatment previously accorded by Customs to substantially identical merchandise. Notice of the proposed revocations was published in the CUSTOMS BULLETIN of March 22, 2000, Vol. 34, No. 12. No comments were received.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after July 10, 2000.

FOR FURTHER INFORMATION CONTACT: Josephine Baiamonte, Textile Branch, (202) 927-2394.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addi-

tion, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

In Port Decision (PD) E87711, dated September 29, 1999, the classification of a woman's knit top was determined to be in heading 6114, HTSUS, which provides for women's other knit garments. Since the issuance of this ruling, Customs has had a chance to review the classification of this merchandise and has determined that the classification is in error.

Customs, pursuant to 19 U.S.C. 1625(c)(1), is revoking PD E87711, and any other rulings not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 963467 (see "Attachment" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical merchandise.

As stated in the proposed notice, this revocation will cover any rulings on this issue which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during the notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Dated: April 25, 2000.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, April 25, 2000.

CLA-2 RR:CR:TE 963467 jb
Category: Classification
Tariff No. 6109.10.0060

BRENDA JACOBS, ESQ.
POWELL, GOLDSTEIN, FRAZER & MURPHY LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Re: Classification of women's knit upper body garment; revocation of PD E87711.

DEAR MS. JACOBS:

This is in response to your letter, dated October 15, 1999, on behalf of your client, Hoi Meng Garment Manufactory Ltd., regarding a request for reconsideration of Port Decision Letter (PD) E87711, dated September 29, 1999, which addressed the classification under the Harmonized Tariff Schedule of the United States (HTSUS) of a woman's knit top. Upon review of that ruling we find that the classification of that merchandise in heading 6114, HTSUS, is in error. The correct classification for this merchandise is in heading 6109, HTSUS, pursuant to the analysis which follows below.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed revocation of PD E87711 was published on March 22, 2000, in the CUSTOMS BULLETIN, Volume 34, Number 12.

Facts:

The subject sleeveless garment, referenced style number 1, is composed of a 100 percent cotton rib knit fabric and features ¼ inch elasticized shoulder straps, a "U" shaped neckline in front and back, and a hemmed bottom. The garment also has a double layer of fabric at the front bodice and embroidery at the top of the front of the garment.

Issue:

What is the proper classification for the subject garment?

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI). GRI 1 requires that classification be determined according to the terms of the headings and any relative section or chapter notes. Where goods cannot be classified solely on the basis of GRI 1, the remaining GRI will be applied, in the order of their appearance.

The two classification provisions at issue for this merchandise are heading 6109, and heading 6114, HTSUS. Note 5 to chapter 61, HTSUS, states that, "Heading 6109 does not cover garments with a drawstring, ribbed waistband or other means of tightening at the bottom of the garment." Heading 6109, HTSUS, provides for, among other things, tank tops. As the term "tank top" is neither defined in the legal notes to the HTSUS nor in the corresponding *Explanatory Notes to the Harmonized Commodity Description and Coding System* (EN), we look to the *Guidelines for the Reporting of Imported Products in Various Textile and Apparel Categories*, CIE 13/88 (1988), (herein *Guidelines*) for assistance. The *Guidelines* definition of the term "tank top" is indicative of a garment which is:

* * * sleeveless with oversized armholes, with or without a significant drop below the arm. The front and the back may have a round, V, U, scoop, boat, square or other shaped neck which must be below the nape of the neck. The body of the garment is supported by straps not over two inches in width reaching over the shoulder. The straps must be attached to the garment and not be easily detachable. Bottom hems may be straight or curved, side-vented, or of any other type normally found on a blouse or shirt, including blouse or drawstring waists or an elastic bottom. The following features would preclude a garment from consideration as a tank top:

- 1) pockets, real or simulated, other than breast pockets;
- 2) any belt treatment including simple loops;
- 3) any type of front or back neck opening (zipper, button, or otherwise).

This definition is consistent with the definition found in Charlotte Mankey Calasibetta's *Essential Terms of Fashion* (1986) at 221:

Similar to men's undershirt with U-neckline and deep armholes, shaped toward shoulder to form narrow straps; named for tank suit. * * *

Before we can even arrive at the features which would preclude a garment from qualifying as a tank top, a garment must already possess certain basic features. It is clear from these definitions that the fundamental features of a "tank top" require a drop below the neckline front and back, as well as deep armholes in order to form narrow straps. These features are critical in creating the silhouette which is the distinguishing characteristic of the tank top.

The subject garment falls squarely within the descriptions set forth in the above stated definitions. That is, the shoulder straps are two inches or less in width, the neckline (both front and back) is U-shaped, the armholes are oversized, and there is no tightening at the bottom. As such, the subject sample is commonly recognized as what is known in the trade as a "tank top", and qualifies for classification in heading 6109, HTSUS.

Heading 6114, HTSUS, provides for other garments, knitted or crocheted. The EN to that heading state that, "this heading covers knitted or crocheted garments which are not included more specifically in the preceding headings of this Chapter." Accordingly, as we have already determined that the subject garment is more specifically recognized as a "tank top" in heading 6109, HTSUS, we are precluded from classifying this merchandise in heading 6114, HTSUS.

Holding:

The subject garment, referenced style 1, is correctly classified in subheading 6109.10.0060, HTSUSA, which provides for, T-shirts, singlets, tank tops and similar garments, knitted or crocheted: of cotton: women's or girls': tank tops: women's. The applicable general column one rate of duty is 18.3 percent *ad valorem* and the textile quota category is 339.

PD E87711 dated September 29, 1999, is hereby revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest your client check, close to the time of shipment, the *Status on Current Import Quotas (Restraint Levels)*, an issuance of the U.S. Customs Service, which is updated weekly and is available at the local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, your client should contact the local Customs office prior to importing the merchandise to determine the current applicability of any import restraints or requirements.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO THE CLASSIFICATION OF A TEXTILE PIN

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of a classification ruling letter and treatment relating to the classification of certain textile gift box brooches.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), this notice advises interested parties that Customs is revoking a ruling letter pertaining to the tariff classification of certain gift box brooches and revoking any treatment previously accorded by Customs to substantially identical merchandise.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after July 10, 2000.

FOR FURTHER INFORMATION CONTACT: Josephine Baiamonte, Textile Branch, (202) 927-2394.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

In Headquarters Ruling Letter (HQ) 961833, dated May 19, 1999, the classification of certain textile gift box brooches was determined to be in heading 7117, HTSUS, which provides for imitation jewelry. Customs has had a chance to review the classification of this merchandise and has determined that although the analysis regarding consideration of heading 9505 was correct, the classification of this merchandise in heading 7117, HTSUS, is in error.

Customs, pursuant to 19 U.S.C. 1625(c)(1), is revoking HQ 961833, and any other rulings not specifically identified to reflect the proper

classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 963452 (see "Attachment " to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical merchandise.

As stated in the proposed notice, this revocation will cover any rulings on this issue which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during the notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Dated: April 20, 2000.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, April 20, 2000.

CLA-2 RR-CR:TE 963452 jb
Category: Classification
Tariff No. 6217.10.9530

LOUIS SHOICHET, Esq.
TOMPKINS & DAVIDSON
One Astor Plaza
1515 Broadway
New York, NY 10036

Re: Revocation of HQ 961833; classification of textile Gift Box Brooches.

DEAR MR. SHOICHET:

On May 19, 1999, this office issued to you Headquarters Ruling Letter (HQ) 961833, classifying merchandise referred to as textile "Gift Box Brooches" in heading 7117, Harmonized Tariff Schedule of the United States (HTSUS), in the provision for imitation jewelry. This letter is to inform you that upon review of that ruling we have determined that classification of that merchandise in heading 7117, HTSUS, is in error. The correct classification for this merchandise is in heading 6217, HTSUS, as an other made-up clothing accessory, pursuant to the analysis which follows below.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed revocation of HQ 961833 was published on March 15, 2000, in the CUSTOMS BULLETIN, Volume 34, Number 11.

Facts:

The subject merchandise consists of two square brooches decorated to represent small wrapped gift boxes. The "box" portion of the brooch is formed by a one inch square piece of foam covered by either gold or silver toned woven polyester fabric and a "bow"-shaped green textile ribbon and textile rose. This portion is then attached to the metal pin.

There is a discussion in the law and analysis portion of HQ 961833 regarding the possibility of heading 9505, HTSUS, (which provides for, among other things, "festive articles"), as one of the headings meriting consideration with respect to the classification of this merchandise. Therein, HQ 961833 addresses the scope of *Midwest of Cannon Falls, Inc. v. United States*, 122 F3d 1423 (Fed. Cir. 1997) and concludes that *Midwest* did not include within the scope of heading 9505, HTSUS, "articles of personal adornment." As this accurately reflects Customs position with respect to the classification of this merchandise in heading 9505, HTSUS, this portion of the analysis will not be repeated here. This letter will only address itself to an analysis of heading 6217, HTSUS, and heading 7117, HTSUS.

Issue:

What is the proper classification for the merchandise at issue?

Law and Analysis

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the rules of the headings and any relative section or chapter notes, taken in order. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI.

There are two plausible classifications for the subject merchandise, that is, heading 7117, HTSUS, which provides for, *inter alia*, imitation jewelry and heading 6217, HTSUSA, which provides for, *inter alia*, other made up clothing accessories. Note 3(g) to chapter 71, HTSUS, states that this chapter does not cover goods of section XI (textiles and textile articles). As the subject brooches are composed in part of textile materials, we must determine whether they fall within the exclusionary language set forth in Note 3(g) to chapter 71, HTSUS.

General Rule of Interpretation (GRI) 3 states:

- (a). The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings

each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b). Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

The EN to GRI 3(b) state:

(VII). In all these cases the goods are to be classified as if they consisted of the material or component **which gives them their essential character**, insofar as this criterion is applicable.

(VIII). The factor which determines the essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

As we stated in HQ 080498, dated December 28, 1989,

The provision for jewelry in subheading 7117.90.5000, HTSUSA, cannot be looked at in a vacuum. Certainly, the limitation placed on that subheading by Legal Note 3(f) to that chapter which excludes textile articles from classification thereunder makes it impossible to conclude that the specificity requirements of GRI 3(a) control classification of the bar pin. Inasmuch as classification cannot be determined by the application of GRI 3(a), we must resort to GRI 3(b) * * *.

In the case of the subject merchandise, the textile component clearly provides the brooches with their essential character. It is the ornamentation provided by the textile material, in the shape of the decorative "box", which provides this merchandise with its shape and saleability.

The EN to heading 6217, HTSUSA, state, in pertinent part:

This heading covers made up textile clothing accessories, **other than knitted or crocheted**, not specified or included in other headings of this Chapter or elsewhere in the Nomenclature. The heading also covers parts of garments or of clothing accessories, not knitted or crocheted, **other than parts of articles of heading 62.12**.

The heading covers, *inter alia*:

(8) **Labels, badges, emblems, "flashes" and the like (excluding embroidered motifs of heading 58.10) made up otherwise than by cutting to shape or size. (When made up only by cutting to shape or size these articles are excluded—heading 58.07.)**

Customs has classified similar textile pins in the past. Textile pins have consistently been classified in the appropriate provisions in heading 6217, HTSUSA, or heading 6117, HTSUSA, as other made up clothing accessories. Similar to the idea of "badges" which are affixed to clothing by a bar pin, the metal bar pins on the textile pins enable them to be affixed to garments and thus considered accessories to garments. See also HQ 080498, dated December 28, 1989, HQ 960401, dated July 16, 1997, and HQ 958167, dated August 30, 1995, classifying similar merchandise in heading 6217, HTSUSA.

Accordingly, the subject merchandise is properly classified in heading 6217, HTSUSA.

Holding:

The subject textile "Gift Box Brooches" are classified in subheading 6217.10.9530, HTSUSA, which provides for other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212: accessories: other: other: of man-made fibers. The applicable general column one rate of duty is 15 percent *ad valorem* and the quota category is 659.

HQ 961833 dated May 19, 1999, is hereby revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

The designated textile and apparel categories may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available we suggest your client check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an issuance of the U.S. Customs Service which is updated weekly and is available at the local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, your client should contact the local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO THE CLASSIFICATION OF A WOMAN'S KNIT PULLOVER SWEATER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of classification ruling letter and treatment relating to the classification of a woman's knit pullover sweater.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), this notice advises interested parties that Customs is revoking a ruling letter pertaining to the tariff classification of a woman's knit pullover sweater and revoking any treatment previously accorded by Customs to substantially identical merchandise. Notice of the proposed revocation was published in the CUSTOMS BULLETIN of March 8, 2000, Vol. 34, No. 10. No comments were received.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after July 10, 2000.

FOR FURTHER INFORMATION CONTACT: Josephine Baiamonte, Textile Branch, (202) 927-2394.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act

of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

In PD D89797, dated May 7, 1999, the classification of a woman's knit pullover sweater was determined to be in subheading 6110.10.1020, HTSUSA, which provides for women's sweaters, wholly of cashmere. Since the issuance of this ruling, Customs has had a chance to review the classification of this merchandise and has determined that the classification is in error.

Customs, pursuant to 19 U.S.C. 1625(c)(1), is revoking PD D89797, and any other rulings not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 963694 (see "Attachment" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical merchandise. Before taking this action, consideration will be given to any written comments timely received.

As stated in the proposed notice, this revocation will cover any rulings on this issue which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during the notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Dated: April 20, 2000.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, April 20, 2000.
CLA-2 RR:CR:TE 963694 jb
Category: Classification
Tariff No. 6110.10.2030

MR. JOHN IMBROGULIO
NORDSTROM
1617 Sixth Avenue, Suite 1000
Seattle, WA 98101

Re: Classification of knit garments: wholly of; General Note 19(e)(i).

DEAR MR. IMBROGULIO:

On May 7, 1999, Customs, at the port of El Paso, Texas, issued to you Port Decision Letter (PD) D89797, classifying certain women's knit garments in subheading 6110.10.1020, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), in the provision for women's sweaters, wholly of cashmere. Upon review of that ruling we have determined that classification of that merchandise in subheading 6110.10.1020, HTSUSA, is in error. The correct classification of the subject merchandise is in subheading 6110.10.2030, HTSUSA, pursuant to the analysis that follows below.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed revocation of PD D89797 was published on March 8, 2000, in the CUSTOMS BULLETIN, Volume 34, Number 10. No comments were received.

Facts:

The subject garment, referenced style CC1653, is a woman's pullover sweater, constructed of 51 percent cashmere and 49 percent cotton knit fabric, with less than nine stitches per two centimeters measured in the horizontal direction. The sweater, which extends below the waist, features a crew neck, long sleeves with rib-knit cuffs and a rib-knit bottom.

Issue:

What is the proper classification for the subject merchandise?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes, taken in order. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI.

Chapter 61, HTSUS, provides for articles of apparel and clothing accessories, knitted or crocheted. Statistical Note 3 to that chapter states that, "For purposes of this chapter, statistical provisions for sweaters include garments, whether or not known as pullovers, vests or cardigans, the outer surfaces of which are constructed essentially with 9 or fewer stitches per 2 centimeters measured in the direction the stitches were formed, and garments, known as sweaters, where, due to their construction, the stitches on the outer surface cannot be counted in the direction the stitches were formed."

Heading 6110, HTSUS, provides for, sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted.

General Note 19(e)(i) states:

the terms "*wholly of*", "*in part of*", and "*containing*", when used between the description of an article and a material (e.g., "*woven fabrics, wholly of cotton*"), have the following meanings:

- (i) "*wholly of*" means that the goods are, except for negligible or insignificant quantities of some other material or materials, composed completely of the named material;

With regard to the application of the quantitative concepts specified above, it is intended that the *de minimis* rule apply.

As the submitted garments are composed of a blend of cashmere and cotton, a critical issue in the proper classification of the subject garments, is the interpretation of "wholly of." This understanding is important at the subheading level where garments will be classified in the provision for "wholly of" cashmere or in the alternate provision for other wool fibers. As set forth in the definition in General Note 19(e)(i), HTSUS, it is clear that any such interpretation will call for some quantitative limitations which, if exceeded, would result in a garment that is not "wholly of cashmere". Although the definition of "wholly of" as set forth in the above cited General Note does not provide guidance with respect to a limiting "quantitative restriction", it does provide us with guidance via the use of certain terminology reflected in that definition. In particular, that definition makes reference to "negligible or insignificant quantities" and "de minimis."

The term "negligible" as defined in *Webster's Ninth New Collegiate Dictionary*, 1991, at 791, states, "so small or unimportant or of so little consequence as to warrant little or no attention." Read in terms of the "wholly of" definition, it would indicate that the amount of the blended fiber is so small as to have little to no consequence on the ultimate product. The same source, at 626, defines "insignificant" as, "lacking meaning or import; not worth considering." Stated another way, the role of the blended fiber must be insignificant to the garment. To complete our understanding of "wholly of", there is one more concept that needs to be introduced, that is, *de minimis*. The *de minimis* rule provides that an ingredient or component of an article may be ignored for classification purposes depending upon whether or not the amount used has noticeably changed or affected the nature of the article.

As such, when reading these concepts together in our understanding of "wholly of" we arrive at a two prong definition:

1. where the blended fiber is introduced into the cashmere in an amount so small that it is determined to be of little importance to the garment itself; or
2. where the blended fiber adds little to no commercial significance to the garment

the garment is considered for classification purposes, "wholly of" cashmere.

As we stated in HQ 962706, dated August 17, 1999,

With respect to the first prong, the "amount" that will trigger "importance" to the garment, will vary with the particular fiber blend. In speaking with different members of the fabric and garment industry it was brought to our attention that when referring to spandex, a percentage such as 2 percent could be considered significant. When referring to other blended fibers, it is our belief that depending on the fiber, over 3 percent of an "other fiber" could be considered significant.

As such, we emphasize that the caveat in this definition is that results will vary depending on the fiber used and the role/significance of that specific fiber to the garment in question. As such, the results obtained by application of this definition on any one garment, should in no way be understood to be applicable to other garments. This is because different results will be obtained depending on the amount of blended fiber present in the garment and the role it plays in that particular garment.

In the case of the merchandise at issue, it is clear that we do not have a situation where one needs to closely examine the inherent attributes which may be imparted by a small percentage of a particular blended fiber on an otherwise cashmere garment. As the subject garment is composed of fabric containing 49 percent cotton fibers (that is, almost equaling the amount of cashmere found in the garment) one cannot dispute that this amount adds both importance as well as commercial significance to the garment.

As such, we find that the cotton fibers in the knit fabric in these garments is not negligible or insignificant and thus for classification purposes these garments would not qualify as "wholly of cashmere."

Holding:

Style CC1653 is classified in subheading 6110.10.2030, HTSUSA, which provides for "Sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted: Of wool or fine animal hair: Other: Sweaters: Women's." The applicable general column one rate of duty is 16.4 percent ad valorem and the textile quota category is 446.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent negotiations and changes, we suggest that you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an issuance of the U.S. Customs Service, which is updated weekly and is available at the local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

PD 89797 dated May 7, 1999, is hereby revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTERS AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF SUITCASE COMPONENTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of and treatment relating to tariff classification of suitcase components.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), this notice advises interested parties that Customs is revoking rulings pertaining to the tariff classification of suitcase components and revoking any treatment previously accorded by Customs to substantially identical merchandise. Notice of the proposed revocations was published in the CUSTOMS BULLETIN of March 22, 2000, Vol. 34, No. 12. No comments were received.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after July 10, 2000.

FOR FURTHER INFORMATION CONTACT: Greg Deutsch, Textile Branch (202) 927-2302.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI") became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that, in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out

import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

In Headquarters Ruling (HQ) 089289, issued December 9, 1991, a luggage component described as "the bottom half of a pullman suitcase" was classified in subheading 4202.19.0000, HTSUSA, the provision for "Trunks, suitcases * * * and similar containers * * *: Trunks, suitcases * * *: With outer surface of plastics or of textile materials: Other." In HQ 951183, issued June 16, 1992, this office reconsidered and affirmed HQ 089289. In NY 818857, issued February 16, 1996, luggage components described as "the left and right sides of a vertical suitcase," each imported in separate shipments, were classified in subheading 4202.12.8070, HTSUSA, textile category 670, the provision for "Trunks, suitcases * * * and similar containers * * *: Trunks, suitcases * * *: With outer surface of plastics or of textile materials: With outer surface of textile materials: Other, Other: Other: Of man-made fibers."

The sample classified in HQ 089289 and HQ 951183 is described as the bottom half of a pullman suitcase, made of a vinyl-backed nylon material, measuring approximately 31 inches by 24 inches, with an expandable maximum width of 9 inches. The component had a rigid edge, corner piping, a carrying handle, inner straps for retaining clothing, outer straps for reinforcement, a rigid bottom flap with fixtures for the attachment of wheels, and a half zipper sewn around an outside edge. A sample of the top half of the pullman suitcase, although separately imported and not at issue in either of the rulings, was submitted for examination and was found to have the same material composition (as the bottom half), a corresponding half zipper, and a full-width zippered exterior pocket. It was noted that the straps and hardware included on the submitted samples would be imported separately from the top and bottom halves of the suitcase, that post-importation assembly would essentially involve attaching hardware, sewing, and riveting, and that the costs of the bottom, top, and hardware components were approximately 47 percent, 43 percent, and 10 percent of the total costs of the suitcase, respectively.

The samples classified in NY 818857 are identified as the separately imported left and right sides of a vertical suitcase. The samples are described as having an outer surface composition of man-made textile materials. One of the sides is said to be complete with utility pockets.

Each individual component is entered in a shipment separately from any other component(s) with which it could otherwise be assembled after importation to form an article having the essential character of a complete or finished article, and which, pursuant to GRI 2(a), might otherwise be classifiable as that complete or finished article. None of

the imported components, standing alone, possesses the essential character of the heading 4202 exemplars, articles whose essential characteristics and purposes are to organize, store, protect and carry various items. One half of a suitcase comprises only a part of a suitcase. Since no provision under heading 4202, HTSUSA, provides for "parts" of the articles classifiable in the heading, it is Customs position that none of the separately imported suitcase components is an incomplete article which has the essential character of, and is classifiable as, a complete or finished suitcase. The separately imported, individual components are classifiable under heading 6307, HTSUSA, as "Other made up [textile] articles."

Pursuant to 19 U.S.C. § 1625(c)(1), Customs is revoking HQ 089289, HQ 951183, and NY 818857, and any other rulings not specifically identified which involve identical or substantially identical merchandise, to reflect the proper classification of the suitcase components according to the analysis in Headquarters Ruling Letters (HQ) 963486 and HQ 959015, which are set forth as "Attachments A and B" to this document. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), Customs is revoking any treatment that Customs may have previously accorded to substantially identical merchandise.

As stated in the proposed notice, this revocation will cover any rulings on this issue which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during the notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Dated: April 24, 2000.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, April 24, 2000.
CLA-2 RR-CR:TE 963486 GGD
Category: Classification
Tariff No. 6307.90.9989

ROBERT L. FOLLIACK, ESQUIRE
FOLLIACK & BESSICH, P.C.
513 West Mount Pleasant Avenue, Suite 205
Livingston, NJ 07039

Re: Revocation of HQ 089289 and HQ 951183; Suitcase Component; Not incomplete article with essential character of complete or finished suitcase; GRI 2(a); Headings 4202 and 6307; *Totes, Incorporated v. United States*, 18 C.I.T. 919, 865 F. Supp. 867 (1994), aff'd 69 F.3d 495 (Fed. Cir. 1995).

DEAR MR. FOLLIACK:

In Headquarters Ruling Letter (HQ) 089289, issued to you December 9, 1991, on behalf of International Travel System of New Jersey, Ltd. (ITS), a luggage component described as "the bottom half of a pullman suitcase" was classified in subheading 4202.19.0000, HTSUSA, the provision for "Trunks, suitcases * * * and similar containers * * *: Trunks, suitcases * * *: With outer surface of plastics or of textile materials: Other." You subsequently requested reconsideration of that ruling. In HQ 951183, issued to you June 16, 1992, on behalf of ITS, this office reconsidered and affirmed HQ 089289. We have since reviewed both HQ 089289 and HQ 951183 and have found the rulings to be in error. Therefore, this ruling revokes HQ 089289 and HQ 951183.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed revocation of HQ 089289, was published on March 22, 2000, in the CUSTOMS BULLETIN, Volume 34, Number 12.

Facts:

The sample suitcase component at issue in HQ 089289 and HQ 951183, is described in the rulings as being made of a vinyl-backed nylon material, and measuring approximately 31 inches by 24 inches, with an expandable maximum width of 9 inches. The article had a rigid edge, corner piping, a carrying handle, inner straps for retaining clothing, outer straps for reinforcement, a rigid bottom flap with fixtures for the attachment of wheels, and a half zipper sewn around an outside edge.

A sample of the top half of the pullman suitcase, although separately imported and not at issue in either of the rulings, was submitted for examination prior to the issuance of HQ 951183. That component was found to have the same material composition (as the bottom half), a corresponding half zipper, and a full-width, zippered exterior pocket. It was also noted that the straps and hardware included with the submitted samples would be imported separately from the top and bottom halves of the suitcase, that post-importation assembly would essentially involve attaching hardware, sewing, and riveting, and that the costs of the bottom, top, and hardware components were approximately 47 percent, 43 percent, and 10 percent of the total costs of the suitcase, respectively.

Issues:

1) Whether the separately imported component part of a finished suitcase possesses the essential character of a complete or finished suitcase classifiable under heading 4202, HTSUSA.

2) Whether separately shipped, corresponding component parts of a finished suitcase (e.g., a top half and a bottom half) can be aggregated so that each separately imported component is classifiable as a complete or finished article.

Law and Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

Heading 4202, HTSUSA, covers "Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper."

As noted above, classification is made in accordance with the GRI and the terms of the headings with the guidance of the EN to understand the scope of the headings and GRI. Since the bottom half of a suitcase, standing alone, is not a named exemplar of heading 4202, nor similar to any of the complete, fully functional containers named therein, the article cannot be classified pursuant to GRI 1 alone, i.e., according to the terms of the heading. We therefore look to GRI 2(a), which states:

Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), entered unassembled or disassembled.

EN (I) and (VI), to GRI 2(a), are particularly helpful in understanding the scope of GRI 2(a) as it applies to the imported merchandise. The EN contain the following guidance:

(I) The first part of Rule 2(a) extends the scope of any heading which refers to a particular article to cover not only the complete article but also that article incomplete or unfinished, **provided** that, as presented, it has the essential character of the complete or finished article.

(VI) This Rule also applies to incomplete or unfinished articles presented unassembled or disassembled provided that they are to be treated as complete or finished articles by virtue of the first part of this Rule.

Since the imported merchandise is one half of a suitcase, it is an incomplete article. Therefore, the first part of GRI 2(a) is the part of the rule that is most pertinent to the facts of this case. In HQ 089289 and HQ 951183, one half of a suitcase was classified under heading 4202, HTSUSA, by finding that the incomplete article, as presented, had the essential character of the complete or finished article. It appears in the rulings, however, that merchandise not shipped with the individual component, i.e., the absent top half of the suitcase, was erroneously considered to be present at importation and, in light of undemanding post-importation assembly processes, classified as a substantially complete article entered unassembled. HQ 951183 contains a cite to EN (VII). EN (VII), however, provides guidance as to the second part of GRI 2(a), which concerns the importation of articles that are " * * * complete or finished * * * entered unassembled or disassembled" and the means by which such articles are assembled after importation. The imported merchandise at issue here is not complete or finished and does not include components which may be assembled into a complete article.

In determining whether the subject bottom half of a suitcase possesses the essential character of a complete or finished suitcase, we look to the judicial guidance provided in *Totes, Incorporated v. United States*, 18 C.I.T. 919, 865 F.Supp. 867 (1994), aff'd 69 F.3d 495 (Fed. Cir. 1995). In *Totes*, the Court of International Trade (CIT) held that the essential characteristics and purposes of the heading 4202 exemplars are to organize, store, protect and carry various items. Unlike suitcases and all of the other exemplars enumerated in heading 4202, HTSUSA, the half suitcase under consideration here is not able to organize, store, protect, or carry items.

In HQ 956538, issued November 29, 1994 (before the CIT's holding in the *Totes* case had been affirmed by the Court of Appeals for the Federal Circuit), this office discussed the first part of GRI 2(a), and found that the front panel assembly for a suitcase did not possess the essential character of the complete article. We construed the term "essential character" to mean "the attribute which strongly marks or serves to distinguish what an article is; that which is indispensable to the structure, core or condition of the article." We found that the

front panel was no more important to the finished article than the absent walls and rear panel. The front panel assembly was classified in subheading 6307.90.9989, HTSUSA.

In HQ 958773, issued July 29, 1996, we considered the classification of incomplete or unfinished cases that would be fitted, after importation, to hold compact discs (CDs). The protestant had claimed that the merchandise should be classified in subheading 6307.90.9989, HTSUSA, because the cases were imported without the CD-holding, plastic inserts (that would be affixed after importation), and therefore did not have the essential character of finished CD cases. We noted that, despite the absence of the special inserts, the cases, as imported, were designed and dedicated to function as carrying cases that provided a secure, foam-padded, three-dimensional enclosure to completely envelope any items carried. Although the plastic CD-holding inserts would, after importation, provide an organizational aspect to the cases, we found that the articles, as entered, constituted fully functional containers capable of providing storage, protection, and portability. The CD cases, although incomplete, unfinished, and not named exemplars of heading 4202, were found to possess the essential characteristics common to the containers of heading 4202, and were therefore classified in subheading 4202.92.9025, HTSUSA.

We find that, unlike the cases of HQ 958773, the bottom half of the pullman suitcase subject to HQ 089289 and HQ 951183 does not form an enclosure that is able to organize, store, protect, or carry items. The incomplete article, as entered, does not possess the essential character of the complete or finished article.

With respect to whether corresponding component parts of a finished suitcase, e.g., the top half and bottom half imported in separate shipments, can be aggregated and classified as a complete article, we find that they cannot. Although it is declared in HQ 951183 that "[t]he fact that the components will be imported separately has no impact on the applicable classification of the bottom portion and the top portion," the statement is incorrect and runs contrary to law. In HQ 954820, issued December 13, 1993, this office noted:

It is well settled that articles which are not imported together are precluded from being an entirety. *United States v. Baldt Anchor, Chain & Forge Division of Boston Metals Co.*, 59 CCPA 122, C.A.D. 1051, 429 F.2d 1403 (1972).

The term "entirety," which was used in the Tariff Schedules of the United States (TSUS), is embodied in GRI 2(a) of the HTSUS * * *.

The pertinent issue in HQ 954820 was whether two separate shipments which consisted of: 1) the various parts of a printing press; and 2) the main printing head, comprised a complete and unassembled printing press. We held that the two shipments could not constitute a complete printing press and could not be treated as if they had been entered at the same time. The fact that the main printing head was intended to be included in the shipment of the various parts was also found to be irrelevant to the classification. For determinations concerning similar issues, see HQ 081999, issued December 10, 1990, and HQ 958807, issued April 30, 1996.

In light of the above analysis and precedent, we find that the bottom half of the pullman suitcase, as entered, does not possess the essential character of a complete or finished suitcase, and that the imported suitcase component cannot be considered in the aggregate with a separately imported component (e.g., a corresponding top half of a suitcase) so as to be classified as a complete article. The subject article is a part, and is classified in subheading 6307.90.9989, HTSUSA.

Holding:

The imported component, identified as the bottom half of a pullman suitcase, is classified in subheading 6307.90.9989, HTSUSA, the provision for "Other made up articles, including dress patterns: Other: Other: Other: Other." The general column one duty rate is 7 percent ad valorem.

HQ 089289, issued December 9, 1991, and HQ 951183, issued June 16, 1992, are hereby revoked. In accordance with 19 U.S.C. 1625(c), these rulings will become effective 60 days after their publication in the CUSTOMS BULLETIN.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, April 24, 2000.

CLA-2 RR:CR:TE 959015 GGD
Category: Classification
Tariff No. 6307.90.9989

ROBERT L. FOLLIACK, ESQUIRE
FOLLIACK & BESSICH, P.C.
513 West Mount Pleasant Avenue, Suite 205
Livingston, NJ 07039

Re: Revocation of NY 818857; Suitcase Components; Not incomplete articles with essential character of complete or finished suitcases; GRI 2(a); Headings 4202 and 6307; *Totes, Incorporated v. United States*, 18 C.I.T. 919, 865 F.Supp. 867 (1994), aff'd 69 F.3d 495 (Fed. Cir. 1995).

DEAR MR. FOLLIACK:

In New York Ruling Letter (NY) 818857, issued to you February 16, 1996, on behalf of Seil Company, Ltd., of Korea, luggage components described as "the left and right sides of a vertical suitcase," each imported in separate shipments, were classified in subheading 4202.12.8070, HTSUSA, textile category 670, the provision for "Trunks, suitcases * * * and similar containers * * *: Trunks, suitcases * * *: With outer surface of plastics or of textile materials: With outer surface of textile materials: Other: Other: Of man-made fibers." You subsequently requested reconsideration of that ruling. We have reviewed NY 818857 and have found it to be in error. Therefore, this ruling revokes NY 818857.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed revocation of NY 818857 was published on March 22, 2000, in the CUSTOMS BULLETIN, Volume 34, Number 12.

Facts:

The samples at issue are the separately imported left and right sides of a vertical suitcase. The articles are described as having an outer surface composition of man-made textile materials. One of the sides is said to be complete with utility pockets.

Issue:

Whether the separately imported component part of a finished suitcase possesses the essential character of a complete or finished suitcase classifiable under heading 4202, HTSUSA.

Law and Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

Heading 4202, HTSUSA, covers "Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper."

As noted above, classification is made in accordance with the GRI and the terms of the headings with the guidance of the EN to understand the scope of the headings and GRI. Since the left or right half of a suitcase, standing alone, is not a named exemplar of heading 4202, nor similar to any of the complete, fully functional containers named therein, the ar-

article cannot be classified pursuant to GRI 1 alone, i.e., according to the terms of the heading. We therefore look to GRI 2(a), which states:

Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), entered unassembled or disassembled.

EN (I) and (VI), to GRI 2(a), are particularly helpful in understanding the scope of GRI 2(a) as it applies to the imported merchandise. The EN contain the following guidance:

(I) The first part of Rule 2(a) extends the scope of any heading which refers to a particular article to cover not only the complete article but also that article incomplete or unfinished, **provided** that, as presented, it has the essential character of the complete or finished article.

(VI) This Rule also applies to incomplete or unfinished articles presented unassembled or disassembled provided that they are to be treated as complete or finished articles by virtue of the first part of this Rule.

Since each of the imported components is one half of a suitcase, each is an incomplete article. Therefore, the first part of GRI 2(a) is the part of the rule that is most pertinent to the facts of this case. One half of a suitcase may be classified under heading 4202, HTSUSA, if it is found that the incomplete article, as presented, has the essential character of the complete or finished article.

In determining whether the left side or right side of a suitcase possesses the essential character of a complete or finished suitcase, we look to the judicial guidance provided in *Totes, Incorporated v. United States*, 18 C.I.T. 919, 865 F.Supp. 867 (1994), *aff'd* 69 F.3d 495 (Fed. Cir. 1995). In *Totes*, the Court of International Trade (CIT) held that the essential characteristics and purposes of the heading 4202 exemplars are to organize, store, protect and carry various items. Unlike suitcases and all of the other exemplars enumerated in heading 4202, HTSUSA, neither of the separately imported components under consideration here is able to organize, store, protect, or carry items.

In HQ 956538, issued November 29, 1994 (before the CIT's holding in the *Totes* case had been affirmed by the Court of Appeals for the Federal Circuit), this office discussed the first part of GRI 2(a), and found that the front panel assembly for a suitcase did not possess the essential character of the complete article. We construed the term "essential character" to mean "the attribute which strongly marks or serves to distinguish what an article is; that which is indispensable to the structure, core or condition of the article." We found that the front panel was no more important to the finished article than the absent walls and rear panel. The front panel assembly was classified in subheading 6307.90.9989, HTSUSA.

In HQ 958773, issued July 29, 1996, we considered the classification of incomplete or unfinished cases that would be fitted, after importation, to hold compact discs (CDs). The protestant had claimed that the merchandise should be classified in subheading 6307.90.9989, HTSUSA, because the cases were imported without the CD-holding, plastic inserts (that would be affixed after importation), and therefore did not have the essential character of finished CD cases. We noted that, despite the absence of the special inserts, the cases, as imported, were designed and dedicated to function as carrying cases that provided a secure, foam-padded, three-dimensional enclosure to completely envelope any items carried. Although the plastic CD-holding inserts would, after importation, provide an organizational aspect to the cases, we found that the articles, as entered, constituted fully functional containers capable of providing storage, protection, and portability. The CD cases, although incomplete, unfinished, and not named exemplars of heading 4202, were found to possess the essential characteristics common to the containers of heading 4202, and were therefore classified in subheading 4202.92.9025, HTSUSA.

We find that, unlike the cases of HQ 958773, neither of the separately imported components of the vertical suitcase forms an enclosure that is able to organize, store, protect, or carry items. Neither of the incomplete articles, as entered, possesses the essential character of the complete or finished article.

In light of the above analysis and precedent, we find that neither the left nor right sides of a vertical suitcase, as entered, possesses the essential character of a complete or finished suitcase. Each of the separately imported suitcase components is a part, and is classified in subheading 6307.90.9989, HTSUSA.

Holding:

Each of the imported components, identified as the left and right sides of a vertical suitcase, is classified in subheading 6307.90.9989, HTSUSA, the provision for "Other made up articles, including dress patterns: Other: Other: Other: Other." The general column one duty rate is 7 percent ad valorem.

NY 818857 dated February 16, 1996, is hereby revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION OF A RULING LETTER AND TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF TEXTILE JEWELRY POUCHES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of a tariff classification ruling letter and treatment relating to the tariff classification of textile jewelry pouches.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of textile jewelry pouches and revoking any treatment previously accorded by Customs to substantially identical transactions. Notice of the proposed revocation was published in the CUSTOMS BULLETIN of March 15, 2000, Vol. 34, No. 11. One comment was received supporting the revocation.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after July 10, 2000.

FOR FURTHER INFORMATION CONTACT: Shirley Greitzer, Textile Branch (202) 927-1695.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's

responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. § 1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

In New York Ruling Letter (NY) C89894, dated November 13, 1998, three textile pouches were classified under subheading 4202.32.9550, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for: "Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber, or of paperboard, or wholly or mainly covered with such materials or with paper: Articles of a kind normally carried in the pocket or in the handbag: With outer surface of sheeting of plastic or textile materials: With outer surface of textile materials: Other: Other: Of man-made fibers." It is Customs view that the pouches in question are not of a kind normally carried in the pocket or handbag. The pouches would provide little in the way of protection and portability, therefore they lack the essential characteristics running through the heading 4202 exemplars. We therefore believe that the pouches should have been classified in subheading 6307.90.9989, HTSUSA, as "Other made up articles, including dress patterns: Other: Other: Other: Other: Other: Other."

Customs, pursuant to 19 U.S.C. 1625(c)(1), is revoking NY C89894, and any other ruling not specifically identified on identical or substantially similar merchandise to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 962466 (see "Attachment" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical merchandise.

As stated in the proposed notice, this revocation will cover any rulings on this issue which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during the notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other

reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Dated: April 25, 2000.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, April 25, 2000.
CLA-2 RR:CR:TE 962466 SG
Category: Classification
Tariff No. 6307 90.9989

PETER J FITCH, ESQ
FITCH, KING AND CAFFENTZIZ
116 John Street
New York, NY 10038

Re: Textile Jewelry Pouches; Revocation of NY C89894.

DEAR MR. FITCH:

This letter is in response to your request of December 14, 1998, on behalf of your client, Jewelpak Corporation, for reconsideration of New York Ruling Letter (NY) C89894, dated November 13, 1998, wherein certain textile pouches were classified under heading 4202, Harmonized Tariff Schedule of the United States (HTSUS). Samples were submitted with the request.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed revocation of NY C89894 was published on March 15, 2000, in the CUSTOMS BULLETIN, Volume 34, Number 11. One comment was received supporting the revocation.

Facts:

The merchandise that was the subject of NY C89894, consists of three pouches which are identical except for their size. The pouches measure 2 inches in width and 2 inches in length, 2¼ inches in width and 3¼ inches in length, and 4 inches in width and 5¼ inches in length, respectively. The pouches are closed on three sides; the remaining side is open and has a drawstring closure. The pouches are constructed of woven textile material, which is coated on the exterior with flocking of 100 percent acrylic fibers. "Flock" is a textile material defined in heading 5601, HTS, as "textile fibers, not exceeding 5 millimeters in length."

The woven fabric is 60 percent, by weight, of cotton fibers, and 40 percent of polyester fibers. The pouches are not lined and have no internal or external pockets or special fittings. They are capable of holding a variety of small items. The pouches' opening at the top is drawn closed when the ends of a thin, braided string are pulled in opposite directions. The intended use for these pouches is to hold jewelry.

In NY C89894 Customs ruled that the pouches were classified in subheading 4202.32.9550, HTSUSA, as an article of a kind normally carried in the pocket or handbag, of textile materials, with outer surface of textile materials, of man-made fibers.

Issue:

What is the proper classification for the subject merchandise?

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

Pouches of textile materials similar to the subject merchandise have been classified in both headings 4202 and 6307, HTSUS, depending upon their construction and the purpose(s) for which they are designed. Pouches classified outside of heading 4202, HTSUS, are generally those considered not specially designed to contain particular item(s), or not adequately constructed to sustain repeated use.

Heading 4202, HTSUS, provides for "Trunks, suitcases, vanity cases * * * spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags * * * wallets, purses, map cases, cigarette cases, tobacco pouches * * * bottle cases, jewelry boxes * * * and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber, or of paper-board, or wholly or mainly covered with such materials or with paper.

The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN) to heading 4202 suggest that the expression "similar containers" in the first part of the heading "includes hat boxes, camera accessory cases, cartridge pouches, sheaths for hunting or camping knives, portable tool boxes or cases, specially shaped or internally fitted to contain particular tools with or without their accessories, etc." With regard to the second part of heading 4202, the EN indicate that the expression "similar containers" includes "note-cases, writing-cases, pen-cases, ticket-cases, needle-cases, key-cases, cigar-cases, pipe-cases, tool and jewelry rolls, shoe-cases, brush-cases, etc."

In *Totes, Incorporated v. United States*, 18 Ct. Int'l Trade 919, 865 F. Supp. 867 (1994), aff'd, 69 F.3d 495 (Fed. Cir. 1995), the Court of International Trade held that the essential characteristics and purposes of the heading 4202 exemplars are to organize, store, protect and carry various items. With respect to the broad reach of the residual provision for "similar containers" in heading 4202 by virtue of the rule of *ejusdem generis*, the Court found that the rule requires only that the imported merchandise possess the essential character or purpose running through all of the enumerated exemplars.

Upon examination of the subject textile pouches, it is apparent that they were constructed of material insufficiently durable for continued use. Despite the samples' outer surface flocking, the constituent fabric is fairly flimsy and the pouches have no lining or padding for added protection of the contents. The braided string by which the pouches would be carried is also quite thin. The subject pouches provide little in the way of cushioning, protection or portability. The sample pouches also lack any internal or external pockets or special shapes or fittings by which their contents would be organized. Aside from their being suitable for the storage of contents, these pouches lack the essential characteristics running through the heading 4202 exemplars enumerated above.

Heading 6307, HTSUS, covers other made up textile articles. The EN to heading 6307 indicate that the heading covers made up articles of any textile material which are not included more specifically in other headings of Section XI or elsewhere in the Nomenclature. The EN indicate that the heading includes, among other things, domestic laundry or shoe bags and similar articles. The EN suggest that the heading excludes, among other goods, travel goods (suit-cases, rucksacks, etc.), shopping-bags, toilet-cases, etc., and all similar containers of heading 4202.

In Headquarters Ruling Letter (HQ) 959563, issued October 5, 1998, this office classified a textile drawstring pouch (for toiletries) in subheading 4202.92.3030 (now

4202.92.3031), HTSUSA. Although similar to the subject pouches in dimensions and in its lack of pockets or fittings, that pouch was constructed with three layers of material, i.e., an exterior layer of a ribbed polyester fabric, a middle layer batting of man-made textile material, and an inner lining composed of vinyl. We found that the item was of a strong and durable construction, and that its purpose was to securely carry toiletries and protect them against breakage. (See also HQ 956719, issued July 21, 1994.)

In HQ 960757, issued August 26, 1997, two drawstring pouches similar in features and construction to the subject articles were classified. The pouches were composed of a cotton/nylon woven fabric blend, and they possessed neither lining nor any additional pockets or fittings. The larger of the two pouches measured approximately five inches by seven inches. After finding that the constituent fabric was fairly flimsy and that the pouches would provide their contents little in the way of protection or portability, we classified the articles in subheading 6307.90.9989, HTSUSA.

In light of the sample pouches' weak construction and the lack of features which would provide protection or portability to their contents, we find that the pouches at issue here are classified in subheading 6307.90.9989, HTSUSA. (See also HQ 960206, issued March 17, 1999; HQ 957473, issued March 6, 1995; HQ 956234, issued November 14, 1994; HQ 956425, issued July 28, 1994; HQ 955012, issued October 28, 1993; HQ 089851, issued July 29, 1991; and 086852, issued May 10, 1990.)

Holding:

The subject textile pouches are classified in subheading 6307.90.9989, HTSUSA, the provision for "Other made up articles, including dress patterns: Other: Other: Other: Other." The general column one duty rate is 7 percent ad valorem.

NY C89894 dated November 13, 1998, is hereby revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories applicable to textile merchandise, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

United States Court of International Trade

One Federal Plaza
New York, N.Y. 10278

Chief Judge
Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Richard W. Goldberg
Donald C. Pogue

Evan J. Wallach
Judith M. Barzilay
Delissa Anne Ridgway
Richard K. Eaton

Senior Judges

James L. Watson
Herbert N. Maletz
Nicholas Tsoucalas
R. Kenton Musgrave

Clerk
Leo M. Gordon



Decisions of the United States Court of International Trade

(Slip Op. 00-34)

WARNER-LAMBERT CO., PLAINTIFF *v.* UNITED STATES,
AMERICAN MOTORISTS INSURANCE CO. AND C.A. SHEA & CO., DEFENDANTS

Court No. 00-01-00001

[Application(s) for preliminary injunction denied; motion of defendant United States to dismiss granted.]

(Decided April 4, 2000)

Rode & Qualey (Patrick D. Gill and Eleanore Kelly-Kobayashi) for the plaintiff.

David W. Ogden, Acting Assistant Attorney General; Joseph I. Liebman, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (James A. Curley); and Office of Assistant Chief Counsel, U.S. Customs Service (Jeffrey E. Reim), of counsel, for defendant United States.

Grunfeld, Desiderio, Lebowitz & Silverman LLP (Edward B. Ackerman, Laurence M. Friedman and Michael T. Cone) for defendant American Motorists Insurance Company. Law Offices of Michael P. O'Connor (Michael P. O'Connor) for defendant C.A. Shea & Company.

MEMORANDUM

AQUILINO, *Judge*: The plaintiff commenced this action with the simultaneous filing of a summons and complaint, plus an application for a temporary restraining order and preliminary injunction, averring, among other things, that the U.S. Customs Service had recently

threatened to impose sanctions against plaintiff which would include, *inter alia*, the loss of immediate delivery privileges for *all* merchandise imported into the United States. Such action would have a detrimental impact on the company, one of the largest pharmaceutical manufacturers in the United States and the world. As is attested to in * * * the affidavit * * * attached to the Application for a Temporary Restraining Order and Order to Show Cause * * *, the imposition of sanctions is imminent.¹

Government counsel were afforded an immediate opportunity to dispel the actuality of such a threat. When they proved, at first blush, unable to

¹ Memorandum in Support of Motion for a Preliminary Injunction, pp. 1-2 (emphasis in original).

do so, this court granted the requested temporary restraining order, which the government then formally moved to extend, pending presentation of all the facts and circumstances underlying this action and its resolution by the court.

I

At its commencement, the plaintiff purported to be in the middle of an "ongoing dispute" with Customs over the proof necessary to satisfy the Service that pharmaceuticals imported for clinical and laboratory testing under subheading 9813.00.30 of the Harmonized Tariff Schedule of the United States had been exported or destroyed so as to satisfy the conditions of the bond(s) posted in regard thereto.² The verified complaint posits administrative cases 1996-3801-02071401, 1997-3801-00350501, 1998-3801-20027401, 1998-3801-20028001, 1998-3801-20045401, 1998-3801-20078601, 1998-3801-20102601, 1998-3801-20146601, 1998-3901-20099101, 1998-3801-20254401, 1998-3801-20222901, 1998-3801-20289201, 1999-2304-20109801, 1999-4601-20208501, and 1999-3801-20235801 as involving claims for liquidated damages against the plaintiff.

At the hearing held in open court on plaintiff's application for a preliminary injunction, the government presented evidence as to each of the afore-numbered matters, essentially via Customs Service *Fines, Penalties & Forfeitures* officers ("FPFO") from the ports of Detroit, Michigan and Laredo, Texas. The former considers the cases bearing the eight-digit suffixes 00350501, 20099101, 20254401, 20289201 and 20208501 to be closed. *See* Declaration of Darrell E. Woodard, paras. 10, 34, 17, 19, 35. With regard to those matters partially numbered 20078601, 20102601, 20222901 and 20235801, it is reported that Customs had claimed liquidated damages in each,

alleging a breach of a [Temporary Importation Bond or] TIB * * * due to Warner-Lambert's failure to 1) exportor destroy the imported merchandise prior to expiration of the bond period, and/or 2) provide timely proof to Customs [in regard thereto³.]

that the plaintiff importer has filed petitions for relief therein, and that the Service has yet to resolve any of them. *See id.*, paras. 14, 15, 18, 20, 25. In matter 20146601, involving a claim for \$4,080.00, a petition was filed, which led to reduction of that amount to \$100, albeit as yet unpaid by the plaintiff and thereby deemed delinquent by Customs. *See id.*, para. 16. Petitions were also filed in cases 02071401, 20027401, 20028001 and 20045401. Each was denied, and the Service takes the position that liquidated damages are due and owing.⁴

²*Id.* at 1. American Motorists Insurance Company ("AMICO") and C.A. Shea & Company have been alleged to be plaintiff's surety and its agent, respectively, and to be indispensable to maintenance of the status quo herein, ergo their impounding as parties defendant and coverage by the requested injunctive relief.

³Declaration of Darrell E. Woodard, para. 21.

⁴*See id.*, para. 9 and U.S. Defendant's Exhibit B-2; para. 11 and U.S. Defendant's Exhibit C; para. 12 and U.S. Defendant's Exhibit D; para. 13 and U.S. Defendant's Exhibit E.

Finally, according to the Laredo FPFO, the bond period in matter 20109801

expired on January 19, 1999. Warner-Lambert and AMICO have submitted no documentation to Customs to cancel this bond nor * * * petitioned for relief. This claim is now considered delinquent.

Declaration of Charles E. Dickinson, para. 8. Nonetheless, this declarant further swears as follows:

10. The claim referenced in paragraph 8 above has not been referred to the Department of Justice for initiation of collection actions.

* * * * *

12. To date, importer sanction proceedings have not been initiated by Customs in connection with this delinquent claim. In that regard, notification of proposed sanctions has not been issued to Warner-Lambert. In addition, importer sanctions will not be initiated in the future in connection with this claim.

13. As FPFO for the Port of Laredo, I have not initiated surety sanction procedures against AMICO in connection with the delinquent claim referenced in paragraph 8 above. Specifically, a "Preliminary Show Cause" notification has not been issued to AMICO in connection with this delinquent claim.

Id., paras. 10, 12, 13.

The Detroit FPFO makes similar representations with regard to the five numbered claims, *supra*, deemed now delinquent by him, *e.g.*:

To date, importer sanction proceedings have not been initiated by Customs in connection with these five claims. In that regard, notification of proposed sanctions * * * has not been issued to Warner-Lambert. In addition, importer sanctions will not be initiated in the future in connection with these five claims.

Declaration of Darrell E. Woodard, para. 30(f). As for the surety, he declares:

* * * I have not initiated [] surety sanction procedures against AMICO * * * in connection with the five delinquent claims referenced * * * above. Specifically, a "Preliminary Show Cause" notification * * * has not been issued to AMICO in connection with these five delinquent claims.⁵

Given these representations on the record, the court no longer can discern the kind of threat of immediate, irreparable injury necessary to grant or to sustain the extraordinary equitable relief that is a temporary restraining order or preliminary injunction. And this and other courts have long held that failure to show such threat is ground itself to deny that relief, whatever an applicant's showing with regard to likelihood of

⁵ *Id.*, para. 33. Nevertheless, the plaintiff has brought to the court's attention that, just prior to this declaration and its submission at the hearing, a Customs Notice of Penalty or Liquidated Damages Incurred and Demand for Payment had indeed issued to AMICO on Form 5955A in the amount of \$28,912.96 for case 1998-3801-20102601. On the other hand, letters from government counsel and Mr. Woodard dated March 3 and 6, 2000, respectively, advise that the aforesaid demand in the latter's name had been "sent in error" and thus been rescinded. Cf. Defendant AMICO's Answer and Counterclaim, para. 44 and Exhibit C.

success on the merits, the public interest, and the balance of harm among the parties⁶. See, e.g., *American Stevedoring, Inc. v. U.S. Customs Service*, 18 CIT 331, 335, 852 F. Supp. 1067, 1071 (1994), and cases cited therein.

II

In addition to opposing injunctive relief, the government has interposed a motion to dismiss the complaint on the grounds of lack of subject-matter jurisdiction, mootness, and failure to exhaust administrative remedies.

Of course, matters that are moot do not entail any live case or controversy within the meaning of Article III of the U.S. Constitution, leaving federal courts organized thereunder with no authority to act in regard thereto. See generally *Warth v. Seldin*, 422 U.S. 490 (1975), and cases cited therein. According to the record now developed herein, the administrative cases numbered 1997-3801-00350501, 1998-3901-20099101, 1998-3801-20254401, 1998-3801-20289201, and 1999-4601-20208501 are apparently closed and thus moot.

On the other hand, the report of Customs at bar is that the matters numbered 1998-3801-20078601, 1998-3801-20102601, 1998-3801-20222901, and 1999-3801-20235801 involve petitions still under active agency consideration, which status implicates the constitutional doctrine of ripeness under Article III. That is, in general, only ripe matters should be heard and decided by federal courts.⁷ Indeed, Congress, in the exercise of its authority under that article, has provided in its Customs Courts Act of 1980 that, in an unspecified action like this, "the Court of International Trade shall, where appropriate, require the

⁶ The court notes in passing that defendant AMICO has interposed an answer to plaintiff's complaint alleging, among other things:

50. It is beyond dispute that Customs has demanded payment from AMICO on the bonds.

51. It is beyond dispute that Warner-Lambert executed [an] indemnification agreement whereby it promised to post collateral security upon proof of a demand by Customs.

52. Warner-Lambert's challenge to Customs' demand has no bearing on determining Warner-Lambert's obligation to place sufficient funds with AMICO, as it is irrelevant whether Warner-Lambert believes AMICO will ultimately be liable for the demands asserted by Customs. In fact, it is this very uncertainty which the collateral security clause is meant to address.

56. The language of the indemnity agreement is clear and unequivocal: Warner-Lambert is required to indemnify AMICO for "any and all liability, claim, demand, loss, damage, expense, cost and attorney's fees which it shall at any time incur by reason of its execution of any bond or its payment of or its liability to pay any claim * * * (emphasis added).

Whereupon AMICO prays for entry of judgment in its favor, while at the same time joining in plaintiff's application for a preliminary injunction against Customs—drawn to protect its interests as surety. It states, in part, that this measure is warranted because it will relieve AMICO of the threat of irreparable economic harm if it is sanctioned, as well as the threat of a lengthy and costly administrative proceeding, the existence and outcome of which could be highly prejudicial to the company's business and reputation.

Defendant AMICO's Response to Plaintiff's Motion for a Preliminary Injunction, p. 4. But economic injury is not necessarily "irreparable". See, e.g., *American Stevedoring, Inc. v. U.S. Customs Service*, 18 CIT 331, 335, 852 F.Supp. 1067, 1071 (1994), citing *Sampson v. Murray*, 415 U.S. 61 (1974); *Wisconsin Gas Co. v. Federal Energy Regulatory Comm'n*, 758 F.2d 669 (D.C. Cir. 1985); *Arbor Foods, Inc. v. United States*, 8 CIT 355, 600 F.Supp. 217 (1984).

The answer filed on behalf of defendant C.A. Shea & Company avers that the plaintiff has failed to state a claim upon which relief can be granted since the company is not a proper party to this action. That is, the company's executive vice-president attests that, contrary to plaintiff's pleadings, C.A. Shea is not an agent of AMICO and "does not sign, execute or bind and bond on behalf of any surety company." Affidavit of Lee V. Barther, paras. 3, 4. See Defendant AMICO's Response to Plaintiff's Motion for a Preliminary Injunction, p. 9 ("AMICO has no objection to C.A. Shea & Company being dismissed from the instant action").

⁷ See, e.g., *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1580 (Fed.Cir. 1993), cert. denied, 512 U.S. 1235 (1994). Administrative case 1998-3801-20146601, mitigated to the as-yet-unpaid \$100, implicates another well-established principle, namely, *de minimis non curat lex*. See, e.g., *Wisconsin Dep't of Revenue v. Wm. Wrigley Jr. Co.*, 505 U.S. 214, 231-32 (1992); *United States v. Cavalier Shipping Co.*, 60 CCPA 152, C.A.D. 1103, 478 F.2d 1256 (1973).

exhaustion of administrative remedies." 28 U.S.C. §2637(d). As has been pointed out, the purpose of this authority

is to protect courts from premature involvement in administrative proceedings, and to protect agencies "from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."

Intercargo Ins. Co. v. United States, 19 CIT 1435, 1437, 912 F. Supp. 544, 546 (1995), *aff'd*, 129 F.3d 135 (Fed. Cir. 1997), quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967).

In light of the record now established, the court finds it appropriate that the plaintiff be required to exhaust fully its administrative remedies. The finding applies to all those aforementioned matters not administratively moot or judicially ripe, which leaves only cases numbered 1996-3801-02071401, 1998-3801-20027401, 1998-3801-20028001, 1998-3801-20045401, and 1999-2304-20109801 open for any further discussion, given the representations, *supra*, that Customs considers the claims therein due and owing. In fact, plaintiff's application for injunctive relief itself

concedes that the claim made in *** Case No. 1999-2304-20109801[] was properly made because the material was not exported or destroyed within the required time. The liquidated damages in the amount of \$11,046.58 is [*sic*] being tendered to Customs.

Affidavit of Thomas Czubak, para. 13. See Plaintiff's Complaint, para. 15. With regard to the other four matters, the primary concern, as sworn to by the plaintiff in its complaint, is stated to be as follows:

30. The imposition of sanctions on plaintiff while the challenge to the liquidated damages assessments are [*sic*] pending in the Court of International Trade would have a severe disruptive effect on plaintiff's importing operations and testing facilities.

31. Plaintiff is one of the largest pharmaceutical manufacturers in the United States, and the world, and must be able to promptly and efficiently test experimental drugs on a continuing basis; the imposition of sanctions would have a detrimental impact on all of plaintiff's entries, which number in the thousands annually.

32. The imposition of sanctions against plaintiff would interrupt the continuing manufacturing and supply of its pharmaceutical and non-prescription drug products and potentially limit or prevent their availability to patients and consumers who use them.

See Affidavit of Thomas Czubak, paras. 26-28. See also *id.*, paras. 5, 16; Plaintiff's Complaint, paras. 5, 6. But Customs now denies any intent to seek sanctions⁸ as to the claims deemed delinquent. See Declaration of Darrell E. Woodard, para. 30(f), *supra*.

⁸ The court notes in passing that one of plaintiff's ethical pharmaceutical products singled out in its motion papers as possibly threatened by the government, namely, Rezulin® (troglitazone), is now being removed from the market, albeit on grounds not related hereto. See *F.D.A. Withdraws Drug for Diabetics, Citing Health Risks*, N.Y. Times, March 22, 2000, at A1, col. 1.

This disclaimer thus raises the necessary question as to what, if any, actionable injury is being suffered by the plaintiff, which like any other federal complainant, must allege "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984), citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). See *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, 120 S.Ct. 693, 704 (2000):

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 * * * (1992), we held that, to satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Here, this court cannot, and therefore does not, conclude that the plaintiff now satisfies these requirements for proceeding with this action. Cf. *Intercargo Ins. Co. v. United States*, 19 CIT 1435, 912 F.Supp. 544 (1995), *aff'd*, 129 F.3d 135 (Fed.Cir. 1997).

Of course, this conclusion does not leave Warner-Lambert without any judicial remedy. Indeed, as the plaintiff itself points out, in *United States v. Utex Int'l Inc.*, 857 F.2d 1408, 1414 (Fed.Cir. 1988), the court held that it was unnecessary for a surety to pay liquidated damages and then file a protest thereof under 19 U.S.C. § 1514 before defending itself in a collection action brought against it by Customs pursuant to 28 U.S.C. § 1582. That is, as subsequently explained in *United States v. To-shoku America, Inc.*, 879 F.2d 815, 818 (Fed.Cir. 1989), proof that an importer has complied with the terms and conditions of its bond "has traditionally been and still remains a complete defense to a collection suit brought on the bond", with the court of appeals professing to have held in *Utex* that "an assessment of liquidated damages is not a 'charge or exaction' that must be challenged by protest under 19 U.S.C. § 1514".

III

Whether or not the grant of temporary equitable relief to date has aided in sorting out the parties' differences, or allayed genuine concerns the plaintiff may have had with regard to its enumerated experimental cases and its worldwide business, the court in the light of the foregoing facts and circumstances is required now to deny the application(s) for a preliminary injunction and to grant the U.S. defendant's motion to dismiss plaintiff's complaint. Judgment will enter, dismissing this action in its entirety.⁹

⁹ The court notes in passing that, while this dismissal is not based upon lack of subject-matter jurisdiction under 28 U.S.C. § 1581(i), which issue the court has not found necessary to reach herein, when a main action is dismissed, ancillary claims without an independent basis of jurisdiction, which is the case here, also fail. See, e.g., *Old Republic Ins. Co. v. United States*, 14 CIT 377, 741 F.Supp. 1570 (1990). Cf. 6 Wright & Miller, Federal Practice §1433 (1990).

(Slip. Op. 00-35)

MARATHON OIL CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 95-09-01207

[Plaintiffs' Motion for Summary Judgment granted in part; remanded to Customs for further findings.]

(Decided April 5, 2000)

Phelan & Mitri (Michael F. Mitri), for Plaintiff.

David W. Ogden, Acting Assistant Attorney General; Joseph I. Liebman, Attorney in Charge, International Trade Field Office; (Amy M. Rubin), Trial Attorney, Civil Division, Department of Justice, Commercial Litigation Branch; Chi S. Choy, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, of counsel, for Defendant.

OPINION

I. INTRODUCTION

BARZILAY, *Judge*: Marathon Oil Company ("Marathon") brought this action challenging denials by the U.S. Customs Service ("Customs") of fifteen duty drawback claims filed by Marathon pursuant to the substitution manufacturing provisions of the drawback law, contained in 19 U.S.C. §1313(b)(1994). This Court has jurisdiction pursuant to 28 U.S.C. § 1581(a)(1994).

For the reasons set forth in the following opinion, the Court holds there is no legal impediment for Marathon to claim drawback on its importations of crude petroleum. As explained in the following opinion, however, this case is remanded to Customs to determine whether the entries at issue contained properly designated eligible, duty-paid merchandise qualifying under the substitution provision of the drawback law. Therefore, Plaintiff's motion for summary judgment is granted in part.

II. BACKGROUND

Marathon is a United States petroleum company that owns and operates refineries in several towns throughout the country. It imports crude oil, manufactures a variety of petroleum products, and then exports those products. Marathon maintains a duty drawback program under which it recovers duties that it has paid on imported crude oil through its export of refined petroleum products manufactured from the imported crude oil. This case concerns a series of drawback claims, filed between May 1987 and November 1991, under 19 U.S.C. §1313(b), the provision on substitution for drawback purposes, which provides in relevant part:

If imported duty-paid merchandise and any other merchandise (whether imported or domestic) of the same kind and quality are used in the manufacture or production of articles within a period not to exceed three years from the receipt of such imported mer-

chandise by the manufacturer or producer of such articles, there shall be allowed upon the exportation, or destruction under customs supervision, of any such articles, notwithstanding the fact that none of the imported merchandise may actually have been used in the manufacture or production of the exported or destroyed articles, an amount of drawback equal to that which would have been allowable had the merchandise used therein been imported

* * *

Marathon imports a major portion of its foreign-sourced crude oil through the Louisiana Offshore Oil Port, referred to as "LOOP." *Pl.'s Mem. of Law in Supp. of Pl.'s Mot. for Summ. J.* at 6 ("*Pl.'s Mem.*"). The LOOP facilities receive approximately 30% of all crude oil imported into the United States. The facilities receive up to 1.2 million barrels of crude oil per day from ocean vessels, and the oil is stored in caverns dedicated to a single "type" or "grade" of crude oil as determined by its American Petroleum Institute ("API") gravity and sulfur content. *Id.* Several shippers store their oil at the LOOP at any given time, and imports from different oil manufacturers of the same type of crude oil are commingled in the caverns. *Id.* Plaintiff states that the oil must be stored in commingled caverns because segregated storage by shipper is not economically feasible. *Id.* at 25. "As such, it generally cannot be said that Marathon receives and uses at its refineries the actual, physical molecules of crude oil that it imported and discharged at the LOOP platform." *Id.* From LOOP storage, crude oil is removed from the caverns and delivered to Marathon's refineries.

Customs initiated an administrative audit of one of Marathon's claims in June 1988 and recommended denial of the claim based on procedural deficiencies. Thereafter, Customs requested internal advice from Customs Headquarters in connection with its review of Marathon's subject drawback claims. The issue to be determined was whether the oil imported through the LOOP could be considered "received" as required by the substitution manufacturing drawback provision in light of the fact that it was commingled with other importers' crude oil prior to delivery to Marathon's refineries.

Customs Headquarters issued two rulings in response to the request.¹ The rulings stated that under subsection 1313(b),

- (1) a manufacturer must ultimately receive the actual merchandise it imports even if the merchandise is initially received by some other entity; and (2) the commingling of imported designated crude oil with other importations of crude oil, whether of the same kind and quality or whether of different classes, prior to receipt at the claimant's facility precludes drawback eligibility.

Def.'s Mem. in Support of its Cross-Mot. For Summ. J. and in Opp. to Pl.'s Mot. for Summ. J. at 2 ("*Def.'s Mem.*"). After the Headquarters documents were issued, Marathon submitted to Customs proposed amendments of the subject drawback claims to designate non-LOOP duty paid,

¹ Headquarters Ruling Letter ("HRL") 221794 (Nov. 24, 1989), and HRL 224812 (Feb. 15, 1995).

imported crude oil that presented no question of pre-refinery receipt commingling. These proposed amendments were denied, as were the subsequently filed administrative protests.

Plaintiff thereafter brought this suit, asserting that Customs was incorrect in denying the subject drawback claims. Plaintiff advances two arguments in support of its motion for summary judgment. First, the imported duty-paid crude oil initially designated by Marathon under the subject drawback claims was eligible for designation under the substitution manufacturing provisions of the drawback law, because "receipt" within the meaning of subsection 1313(b) does not require that the actual molecules of imported oil be received in Marathon's refineries. Second, should the Court find Plaintiff's first contention to be erroneous, Plaintiff validly and correctly amended the subject drawback claims to designate eligible imported, duty paid oil. Defendant filed an opposition to Plaintiff's motion and a cross-motion for summary judgment in its favor. Because the Court finds Plaintiff to be correct on its first point, it grants Plaintiff's motion and declines to reach the issue of the amended claim.

III. STANDARD OF REVIEW

Plaintiff brings this action within the Court's jurisdiction pursuant to 28 U.S.C. § 1581(a), alleging that Customs erred in denying Marathon's substitution drawback claims. The issue before the Court, whether the term "receive" as it is used in the drawback statute, favors the meaning attributed to it by Customs or that by Marathon, is one of statutory construction. Such claims are reviewed *de novo*, and in this instance the Court owes no deference to Defendant's interpretation.² Although there is a statutory presumption of correctness for Customs decisions, 28 U.S.C. § 2639(a)(1), when the Court is presented with a question of law in a proper motion for summary judgment, that presumption is not relevant. *Blakley Corp. v. United States*, 22 CIT ___, 15 F. Supp.2d 865, 869 (1998), (citing *Universal Electronics, Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997); see also *Goodman Manufacturing L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995) ("Because there was no factual dispute between the parties, the presumption of correctness is not relevant.")).

This case is before the Court on cross-motions for summary judgment. "When deciding cross-motions for summary judgment, the Court considers each motion separately, and on each views the facts in the light most favorable to the non-moving party." *United States v. So's USA Co.*,

² In instances of statutory interpretation, if Congress' intent is clear, no deference is given the agency's construction; however, if Congress' intent is unclear, the court must defer to the agency's interpretation if it is a reasonable construction of the statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Supreme Court extended *Chevron* deference to administrative regulations in *United States v. Haggard Apparel Co.*, 526 U.S. 380, 119 S.Ct. 1392, 1399 (1999). However, *Chevron* deference is not accorded to customs rulings, as they are not subject to notice and comment procedures. See *Mead Corp. v. United States*, 185 F.3d 1304, 1307 (1999). "Customs rulings do not carry the force of law and are not, like regulations, intended to clarify the rights and obligations of importers beyond the specific case under review. Instead, a ruling merely interprets and applies Customs law to 'a specific set of facts.'" *Id.* (quoting 19 C.F.R. § 177.1(d)(1)(1999)). The Court therefore owes no deference to the Customs Headquarters Rulings at issue in this case.

Inc., 23 CIT ____ (1999), 1999 WL 675408. USCIT R. 56(d) provides that summary judgment may be granted if

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

It is the Court's duty to determine whether there are any factual disputes material to the resolution of the action. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-8 (1986). The basic disputed issue in this case is legal: whether Customs was correct in determining that the drawback statute requires proof that Marathon received the actual molecules of imported crude oil in order for it to be eligible for drawback of duties. Therefore, summary judgment is proper on this issue.

IV. DISCUSSION

This case centers on the meaning of the term "receipt" within the substitution drawback statute. If Plaintiff can show that it received the merchandise within that meaning, it may be eligible for the statutory privilege of drawback.³ As "receipt" is not defined in the statute, the Court uses traditional tools of statutory construction. See *Timex VI, Inc. v. United States*, 157 F. 3d 879, 881 (Fed. Cir. 1998). "Beyond the statute's text, these 'tools' include the statute's structure, canons of statutory construction, and legislative history." *Id.* at 881 (citing *Dunn. v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 470-79 (1997)).

A. TEXTUAL MEANING

Both parties advocate mutually distinct interpretations of the term "receipt." Plaintiff submits that the standard dictionary definition of the term is "to take into possession or delivery," and the legal definition is "to take possession and control." *Pl.'s Mem.* at 12 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1894 (1986); BLACK'S LAW DICTIONARY 1433 (4th ed. 1968)). Marathon claims that its relationship with the LOOP-imported crude oil falls within these definitions. Marathon took title and risk of loss to all of the imported crude oil when it was discharged at the LOOP facility. *Id.* Marathon retained that title and risk of loss throughout its storage at the LOOP and transportation up until its delivery to Marathon's refineries. *Id.* Marathon therefore possessed and controlled the oil from the time it was delivered to LOOP for storage until the time it was exported as refined petroleum products. It generally did not enter Marathon's physical custody until it was delivered to Marathon's refineries; nevertheless, Marathon clearly received the imported, duty-paid crude oil for all common, commercial, and legal purposes.

Additionally, the Court recognizes Plaintiff's theory that it received the oil which was held in the LOOP caverns under an implied bailment

³The Court recognizes Defendant's statement that "drawback, which is an exemption from duty, is a statutory privilege obtainable only . . . [if Marathon shows] that it met the conditions applicable to the asserted basis for drawback" *Def.'s Mem.* at 6.

arrangement with LOOP. *Pl.'s Mem.* at 13. "Bailment" is addressed in AM. JUR. 2D as follows:

A bailment is created by the delivery of personal property by one person to another *in trust for a specific purpose*, pursuant to an express or implied contract to fulfill that trust. Inherent in the bailment relationship is the requirement that the property be returned to the bailor, or duly accounted for by the bailee, when the purpose of the bailment is accomplished, or that it be kept until it is reclaimed by the bailor. * * * Although a bailment is ordinarily created by agreement of the parties, resulting in a consensual delivery and acceptance of the property, such a relationship may also result from the actions and conduct of the parties in dealing with the property in question. 8A AM. JUR. 2D *Bailments* §1 (1997) (emphasis added).

The oil imported by Marathon was conveyed to LOOP for storage until later delivery to Marathon's refineries; this relationship may accurately be interpreted as delivery of personal property in trust for a specific purpose. Subsection 1313(j) of the drawback statute indicates Congress' intent that one is in possession of a product while that product is in bailment.⁴ Plaintiff logically infers from the statutory language, that it could not possess the oil within the language of the statute without first having received it. Possession requires prior receipt.

Plaintiff's meaning attributed to the term receipt accommodates the reality of the oil importation business. Although an importer using the LOOP facility does not ordinarily receive the actual molecules of the oil he imports, and the oil may be held in storage at another facility, for all intents and purposes, the oil is received by the importer.

By contrast, Defendant states simply that the drawback statute requires an exporter to be able to prove receipt of the actual imported merchandise. If Marathon cannot prove physical receipt of the actual molecules of crude oil, it fails the receipt requirement and is ineligible for drawback. *Def.'s Mem.* at 8. "Plainly, if Marathon was unable to retrieve the actual merchandise it imported from the LOOP, it could not have received that merchandise at any of its manufacturing facilities." *Id.*

Because both textual interpretations are feasible, there is no "plain and unambiguous meaning" of the term "receipt." *Timex*, 157 F. 3d at 882 (quoting *Muwwakkil v. Office of Personnel Management*, 18 F. 3d 921, 925 (1998)). Therefore, the Court cannot derive the meaning from the text of the statute alone and must look elsewhere for that meaning.

B. LEGISLATIVE HISTORY

The Court notes the purpose of the substitution drawback statute, as stated in the legislative history of 19 U.S.C. §1313:

The payment of drawbacks is designed to relieve domestic processors and fabricators of imported dutiable merchandise, in compet-

⁴ *Pl.'s Mem.* at 13 references 19 U.S.C. §1313(j)(2)(C)(ii), which states, "is in the possession of, including ownership while in bailment." * * * (emphasis added).

ing for export markets, of the disadvantages which the duties on the imported merchandise would otherwise impose on them. * * * [The substitution provision] was designed to relieve processors * * * of the difficulty and expense of specifically identifying the imported materials that had been used in the production of exported products in order to establish eligibility for drawback.

S. Rep. No. 2165 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3576, 3577. Subsection 1313(p) covers substitution of crude petroleum derivatives, and provides significant insight into Congressional intent regarding oil commingled in storage. Senate Report No. 101-252 describes the analogous situation of jet fuel commingled in common storage facilities:

At most larger airports, jet fuel is handled through common storage facilities, usually operated by an independent service company, and refiners will have commercially interchangeable fuel commingled in these facilities.

S. Rep. No. 101-252 at 39 (1990), *reprinted in* 1990 U.S.C.C.A.N. 928, 966.⁵

Drawback is allowed "on exports of petroleum products stored in common storage when inventory records kept on a monthly basis demonstrate that the claimant has sufficient quantities of duty paid product in common storage to justify the drawback claim." *Id.* The report further defines common storage as "includ[ing] all articles of the same kind and quality stored in an area regardless of the number of bins, tanks, or other containers utilized." *Id.*

These statements demonstrate that Congress intended to permit drawback claims for oil kept in common storage. This section of legislative history pertains to "goods produced from crude petroleum or its derivatives," and hence applies to refined products commingled prior to export. The Court sees no reason that such obvious intent to permit drawback for commingled oil products awaiting export should not also apply to commingled crude oil *before* it is refined into those products. The legislative history indicates Congress' clear understanding of the business efficiency in commingling fuel in a common storage area, and its intent to conform drawback law to that reality. Therefore, the Court reasons that Congress intended no requirement that the actual molecules of oil be received by the importer, so long as the record keeping procedures are sufficient to protect against the possibility of multiple drawback claims on the same product. *See* 19 CFR §191.26(b) (1999)

⁵ The Court recognizes that §1313(p) and its legislative history are dated 1990, while Marathon's claims were filed between 1987 and 1991. The Court sees no reason why the legislative history of the after-enacted subsection should not be indicative of Congressional intent for the statute as a whole. "[A] subsequent amendment and its legislative history, although not controlling, is nonetheless entitled to substantial weight in construing the earlier law." *May Dep't Stores Co. v. Smith*, 572 F.2d 1275, 1278 (8th Cir. 1978) (citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 541 (1962)). Subsection (p) did not replace a prior subsection or purport to fundamentally change the purpose of the drawback law, but merely added a provision for the substitution of finished petroleum derivatives. This addition is consistent with the underlying purpose of the original statute: "to encourage the production of articles for export in the United States, thus increasing domestic manufactures, increasing foreign commerce and aiding American industry and labor." *Lockheed Petroleum Services, Ltd. v. United States*, 4 CIT 25, 28, 557 F.Supp. 583, 586 (1982) (citing *United States v. Int'l Paint Co., Inc.*, 35 CCPA 87, 90 (1948); *United States v. Nat'l Sugar Refining Co.*, 39 CCPA 96, 99 (1951)). As such, the Court believes that the legislative history of subsection (p) is helpful in assessing whether Marathon's claims were eligible for drawback under §1313(b).

(detailing recordkeeping requirements for substitution manufacturing drawback claims).

Defendant claims that allowing commingling of imported crude oil will create the potential for abuse of the drawback laws. *Def.'s Mem.* at 10. Specifically, Defendant contends that because of the eight year period in which imported duty-paid merchandise may be used to produce the merchandise eligible for drawback and file a refund claim for duty paid on the product, and the large number of drawback claims that Customs handles annually,

it is not feasible for Customs to trace the imported duty-paid merchandise designated on each claim to verify that merchandise entered on a particular import entry was not previously (or simultaneously) designated as the basis for a different claim.

Id. Additionally, Defendant claims that Marathon's documentation of its drawback claims indicate that Marathon did not withdraw oil from the LOOP facility in the same quantity as it was delivered into the facility. Because Marathon "presented only summary records applicable to its oil rather than the records on all receipts and withdrawals from the inventory," there is no way for Customs to verify that the petroleum crude imported was indeed used in the manufacture of refined petroleum products. *Id.* at 11.

The Court finds Defendant's claims to be irrelevant to the legal issue. As Plaintiff correctly notes, "no provision of the drawback statute allows drawback to be claimed more than once on designated imported merchandise, and plaintiff has made no such claims." *Pl.'s Reply Br. in Opp. to Def.'s Mem. in Support of its Cross-Mot. For Summ. J. and in Opp. to Pl.'s Mot. for Summ. J.* at 3 ("*Pl.'s Reply Br.*"). Moreover, Customs has presented no evidence that commingling of imported oil prevents Customs from safeguarding against abuse of the drawback laws, or that the Government is incapable of appropriately monitoring the drawback availability of duties paid. *Id.* As such, the Court sees no reason to question either Marathon's record keeping procedures or Customs' ability to monitor drawback claims as it decides the legal issue. The drawback statute does not require receipt of the actual imported oil molecules at Marathon's manufacturing facilities. However, in order to receive the drawback, Plaintiff must show that it has properly documented its drawback claims and supply all relevant information to Customs. Defendant is correct that there must be some method of documenting that an amount of crude petroleum imported through the LOOP facilities was used to claim drawback only once. It is not clear from the papers at Court whether sufficient documentation to that effect was submitted to Customs. A remand is therefore granted to reconsider Plaintiff's claims in light of this ruling.

V. CONCLUSION

For the foregoing reasons, the Court holds that Customs erred in denying Marathon's application for the drawback claims for LOOP-imported crude oil products. Judgment for Plaintiff on this issue will be entered accordingly.

(Slip Op. 00-36)

LACLEDE STEEL CO., ET AL., PLAINTIFFS *v.* UNITED STATES,
DEFENDANT, AND DONGBU STEEL CO. LTD., ET AL., DEFENDANT-INTERVENORS

Consolidated Court No. 93-09-00569-CVD

(Dated April 5, 2000)

ORDER

CARMAN, *Chief Judge*: This matter having been affirmed-in-part and reversed-in-part by the United States Court of Appeals for the Federal Circuit in *AK Steel Corp. v. United States*, 192 F.3d 1367 (Fed. Cir. 1999), and pursuant to this Court's jurisdiction under 28 U.S.C. § 1651 (1994); and upon consideration of the submissions of all parties herein; and in consideration of:

(1) the Court of Appeals having reversed "[t]he portion of the Court of International Trade's judgment sustaining the imposition of countervailing duties based on domestic credit provided to the Korean steel industry by private Korean lenders," *AK Steel*, 192 F.3d at 1376; and

(2) the Court of Appeals having reversed "the portion of the Court of International Trade's judgment affirming the assessment of countervailing duties based on preferential access to foreign credit," *id.* at 1378; it is hereby

ORDERED that this matter is remanded to the United States Department of Commerce to recalculate duties owed in conformity with the decision of the Court of Appeals; and it is further

ORDERED that Commerce file its final results with this Court within seventy-five (75) days of the entry of this Order; and it is further

ORDERED that any party contesting the final remand results shall file comments with the Court within 20 days of the filing of the final remand results and responses shall be due 20 days thereafter.

(Slip Op. 00-37)

TAIWAN SEMICONDUCTOR INDUSTRY ASSOCIATION, ET AL., PLAINTIFFS, AND
MOTOROLA, INC., PLAINTIFF-INTERVENOR v. UNITED STATES, DEFENDANT,
AND MICRON TECHNOLOGY, INC., DEFENDANT-INTERVENOR

Court No. 98-05-01460

[The International Trade Commission's determination on remand is remanded.]

(Decided April 11, 2000)

White & Case, LLP (Christopher F. Corr, Richard G. King, and Amy E. Farrell) for Plaintiffs.

Lyn M. Schlitt, General Counsel; *James A. Toupin*, Deputy General Counsel; *Michael Diehl*, Office of the General Counsel, U.S. International Trade Commission, for Defendant.

Hale and Dorr LLP (Gilbert B. Kaplan, Michael D. Esch, Paul W. Jameson, and Cris R. Revaz) for Defendant-Intervenor.

OPINION

POGUE, *Judge*: On June 30, 1999, the Court remanded this matter to the U.S. International Trade Commission ("Commission"). See *Taiwan Semiconductor Indus. Ass'n v. United States*, 23 CIT ___, 59 F. Supp. 2d 1324 (1999) ("*Taiwan I*").¹ In that decision, the Court reviewed Plaintiffs' USCIT Rule 56.2 motion for judgment on the agency record challenging the Commission's final determination that the industry in the United States producing static random access memory semiconductors ("SRAMs") was materially injured by reason of imports from Taiwan that were sold at less than fair value ("LTFV"). See *id.*

The Commission found in its final determination that "[t]he domestic industry's financial troubles [were] due in significant part to the price depressing effects of the subject imports from Taiwan on the domestic like product[.]" *Static Random Access Memory Semiconductors from the Republic of Korea and Taiwan*, Inv. Nos. 731-TA-761 & 762 (Final)(List 2, Doc. 395)(Apr. 9, 1998) at 37 ("Final Determination").² The Commission, however, did not adequately explain how it avoided attributing to the subject imports the harmful effects from other known sources of injury; therefore, the Court remanded the determination to the Commission for reconsideration consistent with the Court's opinion. See *Taiwan I*, 23 CIT at ___, 59 F. Supp. 2d at 1336. On remand, the Commission again determines that the domestic industry was materially injured by reason of LTFV imports of SRAMs from Taiwan. See Commission's Determ. on Remand (List 2, Doc. 406)(Aug. 30, 1999) at 1 ("Remand Determination").

In reviewing the Commission's remand determination, this Court is presented with the following issues: (1) whether the procedure the Com-

¹ Familiarity with the Court's previous decision is presumed.

² List 1 consists of the documents within the public portion of the record made before the Commission. List 2 consists of the documents within the confidential portion of the same record.

mission followed on remand was lawful; and (2) whether the Commission's remand determination that the domestic industry was materially injured by reason of LTFV imports of SRAMs from Taiwan is supported by substantial evidence and otherwise in accordance with law.

DISCUSSION

1. *Did the Commission conduct its remand proceedings in accordance with law?*

Antidumping proceedings, including the Commission's injury determination under 19 U.S.C. § 1673d(b)(1994), "are investigatory in nature[.]" rather than adjudicatory in nature. See Statement of Administrative Action, H.R. Doc. No. 316, 103rd Cong., 2nd Sess. (1994), reprinted in Uruguay Round Agreements Act, Legislative History, Vol. VI, at 892 ("SAA"); see also *Grupo Industrial Camesa v. United States*, 18 CIT 461, 463, 853 F. Supp. 440, 442-43 (1994), *aff'd*, 85 F.3d 1577 (Fed. Cir. 1996). As such, the provisions of the Administrative Procedure Act ("APA") do not apply to the Commission's injury investigation. Cf. *GSA, S.R.L. v. United States*, 24 CIT ___, ___, 77 F. Supp. 2d 1349, 1359 (1999); see also 19 U.S.C. § 1677c(b)(1994) ("The [Commission's] hearing shall not be subject to the provisions of [5 U.S.C. §§ 551 et seq.], or to [5 U.S.C. § 702].").

After completing an investigation, the six commissioners comprising the Commission, see 19 U.S.C. § 1330(a)(1994), vote on whether the domestic industry has been injured by reason of the subject imports. "If the Commissioners voting on [an injury] determination * * * are evenly divided as to whether the determination should be affirmative or negative, the Commission shall be deemed to have made an affirmative determination." 19 U.S.C. § 1677(11)(1994). "[T]he Commission may function notwithstanding vacancies." 19 U.S.C. § 1330(c)(6).

At the time of the original final determination regarding SRAMs from Taiwan, the Commission was only composed of three members: Chairman Miller, Vice Chairman Bragg, and Commissioner Crawford. See Final Determination at 3 n.1. Vice Chairman Bragg found that the U.S. industry was materially injured by reason of LTFV imports of SRAMs from Taiwan, with Chairman Miller dissenting. See *id.* at 33 n.168. Commissioner Crawford, apparently, had recused herself. See *id.* Thus, Vice Chairman Bragg's decision constituted an affirmative determination of the Commission pursuant to 19 U.S.C. § 1677(11), and the publication of the Commission's final determination was entitled "Views of the Commission." See Final Determination at 3. Accordingly, when the Court remanded, it ordered the Commission to reconsider its affirmative determination, without directing the remand to Vice Chairman Bragg alone. See *Taiwan I*, 23 CIT at ___, 59 F. Supp. 2d at 1336.

By the time of the remand, three new members had been appointed to the Commission: Commissioner Askey, Commissioner Koplan, and Commissioner Hillman. In addition, then Vice Chairman Bragg had become Chairman, and then Chairman Miller had become Vice Chairman. Although the Commission was therefore composed of the full six com-

missioners, only Chairman Bragg prepared views on remand. See Remand Determination at 1 n.1. "The Commission, with Commissioner Crawford not participating, submit[ted] Chairman Bragg's remand views to the Court[] as its 'Views on Remand[.]'" *Id.*; see also Action Jacket Approval Record, Pls.' Resp. to Remand Views, Ex. 1. Moreover, "[b]ecause Vice Chairman Miller's [dissent] was unaffected by the Court's remand order, she did not take part in this remand proceeding." See Remand Determination at 1 n.1.

Plaintiffs now argue that "[t]he remand determination was not an institutional response, and therefore it was unlawful." Pls.' Resp. to Remand Views at 2. According to Plaintiffs, the remand determination only represents the views of Chairman Bragg, rather than the views of the Commission as an institution. See *id.* at 9. Because the applicable statute, case law, and this Court's remand order all compel an institutional response, Plaintiffs maintain, all eligible commissioners should have participated in the determination on remand. See *id.* at 2. Plaintiffs assert that Vice Chairman Miller, Commissioner Koplan, Commissioner Askey, and Commissioner Hillman did not participate in the remand proceeding. See *id.* at 2.³

The plain language of the statute indicates that remands from this court are indeed made to the Commission as a whole: "If the final disposition of an action brought under this section is not in harmony with the published determination of * * * the Commission, the matter shall be remanded to the * * * Commission * * * for disposition consistent with the final disposition of the court." 19 U.S.C. § 1516a(c)(3)(1994).

Likewise, this court has recognized the general rule that, where possible, all sitting commissioners should participate in a remand made to the Commission. See *Trent Tube Div. v. United States*, 14 CIT 780, 784, 752 F. Supp. 468, 472 (1990)("[R]emands to the Commission ordering explanations of the views of individual members require an 'institutional response' irrespective of the makeup of the Commission's membership at the time it receives remand instructions."), *aff'd*, 975 F.2d 807, 814 (Fed. Cir. 1992)("[The CIT] was free, within reasonable limits, to set the parameters of the remand, which required an institutional response irrespective of flux in the Commission's membership."); *Metallwerken Nederland B.V. v. United States*, 14 CIT 481, 490, 744 F. Supp. 281, 288 (1990)(recognizing that remands are generally to the Commission as a whole)(citing 19 U.S.C. § 1516a(c)(3)(1988)); *Asociacion Colombiana de Exportadores de Flores v. United States*, 12 CIT 1174, 1176 n.2, 704 F. Supp. 1068, 1070 n.2 (1988)("[R]emands are made to the [Commission], not to the individual commissioners. Where possible all commissioners should participate in remand determinations."); *USX Corp. v. United States*, 12 CIT 844, 845, 698 F. Supp. 234, 236 n.3 (1988)(indicating that

³ Plaintiffs do not appear to challenge Commissioner Crawford's non-participation. See Pls.' Resp. to Remand Views at 2. The original and remand determinations merely indicate that Commissioner Crawford did not participate in both decisions without explaining why she was excused. See Final Determination at 33 n.168; Remand Determination at 1 n.1. Nevertheless, both Plaintiffs and Defendant appear to agree that she had validly recused herself and was therefore ineligible. See Pls.' Resp. to Remand Views at 2-3; Def.'s Resp. to Cm'ta. on Remand Determination at 3.

a newly-appointed commissioner, not on the Commission at the time of the original decision, should have participated in the remand because "remand is made to the entire Commission[;] [t]he Commission, rather than individual commissioners, acts"); *SCM Corp. v. United States*, 2 CIT 1, 7, 519 F. Supp. 911, 915 (1981) ("Clearly, the Commission, like this Court, is a continuing institution, regardless of changes in its membership.").

In addition, although the Court has the authority to remand the individual views of specific commissioners, see, e.g., *Nippon Steel Corp. v. United States*, 19 CIT 827, 827-28 (1995); *Bando Chemical Indus., Ltd. v. United States*, 16 CIT 133, 137, 787 F. Supp. 224, 227 (1992), *aff'd*, 26 F.3d 139 (Fed. Cir. 1994), in this case, the Court ordered "the Commission" to reconsider its affirmative determination, instead of remanding the determination to Chairman Bragg, the author of the Commission's original majority determination, alone. See *Taiwan I*, 23 CIT at ___, 59 F. Supp. 2d at 1336. To be sure, the Court could have more specifically instructed that its remand was directed to the entire Commission. See *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1231, 704 F. Supp. 1075, 1103 (1988) ("This remand is directed to the entire Commission, and not just individual commissioners.") (citing *Asociacion Colombiana*, 12 CIT at 1176 n.2, 704 F. Supp. at 1070 n.2). Nevertheless, this Court has the authority to construe its own remand order. See *Laitram Corp. v. NEC Corp.*, 115 F.3d 947, 950-51 (Fed. Cir. 1997) (citing *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895)).

Therefore, based on the relevant statutory provision, the case law, and the Court's remand order in *Taiwan I*, the Court agrees with Plaintiffs that all eligible commissioners should have participated in the remand. To prevail, however, Plaintiffs must still satisfy their burden of demonstrating to the Court that all the eligible commissioners did not meaningfully participate in the remand.

The presumption of regularity supporting the acts of agency officials mandates that, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). Consistent with this principle, in *United States v. Morgan*, 313 U.S. 409, 422 (1941), the Supreme Court held that courts cannot probe the extent of an agency official's consideration and understanding of an issue in making a decision. Subsequently, the Supreme Court has qualified *Morgan* to the limited extent that a court may probe an agency official's thought processes if the challenger makes a "strong showing of bad faith or improper behavior" on the part of the agency official, and the agency has supplied the basis of its decision in formal findings. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

In applying these principles, federal courts have consistently recognized that challengers must satisfy a high burden in order to rebut the presumption that agency officials have adequately considered the issues in making a final decision, including their reading and understanding of

the record evidence. See, e.g., *Franklin Savings Ass'n v. Ryan*, 922 F.2d 209, 211 (4th Cir. 1991) ("Since *Morgan*, federal courts have consistently held that, absent 'extraordinary circumstances,' a government decision-maker will not be compelled to testify about his mental processes in reaching a decision, 'including the manner and extent of his study of the record[.]'") (citations omitted); *Nat'l Small Shipments Traffic Conference, Inc. v. ICC*, 725 F.2d 1442, 1450 (D.C. Cir. 1984) ("Because of the strong presumption of regularity in administrative proceedings, reviewing courts will not normally entertain procedural challenges that members of the body inadequately considered the issues before reaching a final decision[.]"); *Nat'l Nutritional Foods Ass'n v. FDA*, 491 F.2d 1141, 1144-46 (2d Cir. 1974); *Grupo Industrial Camesa*, 18 CIT at 463-64, 853 F. Supp. at 443.

Here, while the record does warrant concern, Plaintiffs have not made the clear showing of misconduct required to rebut the presumption of regularity. To prove that no commissioners other than Chairman Bragg meaningfully participated in the remand, Plaintiffs point to a footnote of the remand determination and to the Commission Action Jacket Approval Record. See Pls.' Resp. to Remand Views at 10-11 (citing Remand Determination at 1 n.1 and Action Jacket Approval Record, Ex. 1 to Pls.' Resp. to Remand Views).

The remand determination footnote states,

The views of Chairman Bragg comprised the Commission's determination in this investigation. The Commission, with Commissioner Crawford not participating, submits Chairman Bragg's remand views to the Court, as its "Views on Remand" providing further explanation of the Commission's original determination in response to the Court's decision. Vice Chairman Miller reaffirms her negative views in this investigation. Because Vice Chairman Miller's negative determination was unaffected by this Court's remand order, she did not take part in this remand proceeding.

Remand Determination at 1 n.1.

Interpreting this footnote, Plaintiffs argue that the remand determination did not constitute an institutional response from the full Commission because Chairman Bragg alone prepared remand views. See Pls.' Resp. to Remand Views at 9-10. It is not necessary, however, for each commissioner to participate in drafting the decision or to submit individual views. Rather, the statute merely requires a single, written determination from the Commission, leaving to each commissioner's discretion whether to prepare separate or dissenting views. See 19 U.S.C. §§ 1673d(d), 1677(7)(B); cf. H.R. Rep. No. 96-317, 96th Cong., 1st Sess. at 46 (1979) ("[T]he Committee [on Ways and Means] intends that the [Commission] determination, as well as any dissenting or separate views of the individual Commissioners, be specific in its statement of findings of fact and conclusions of law."). Accordingly, it is appropriate for commissioners to adopt one another's views. Cf. *Hannibal Indus., Inc. v. United States*, 13 CIT 202, 203, 710 F. Supp. 332, 334 (1989) ("On

remand, the Chairman adopted the Vice Chairman's views on causation and her finding of no material injury.").

The remand determination footnote states, "*The Commission*, with Commissioner Crawford not participating, submits Chairman Bragg's remand views to the Court, as *its* 'Views on Remand[.]'" Remand Determination at 1 n.1 (emphasis added). In this light, it appears that newly-appointed commissioners Askey, Koplan, and Hillman adopted Chairman Bragg's remand views. Employing the presumption of regularity in agency decision making, the Court presumes that commissioners Askey, Koplan, and Hillman would not have chosen to adopt Chairman Bragg's views as the views of the Commission without an adequate consideration of the issues and the record evidence. Therefore, they presumably participated in the remand determination.

At the same time, the remand determination footnote states that Vice Chairman Miller reaffirmed her dissent. *See id.* The last sentence of the footnote, however, calls Vice Chairman Miller's participation into question, as it states that "she did not take part in this remand proceeding." *Id.* Nevertheless, this tension in language does not clearly indicate that Vice Chairman Miller did not participate in the remand. Employing the presumption of regularity in interpreting the entire footnote, we conclude that Miller's continued dissent constituted participation, as it indicates that she considered the merits of the decision. Therefore, reviewing the remand determination footnote, the Court must presume that Vice Chairman Miller meaningfully took part in the remand proceeding.

Similarly, the Commission Action Jacket Approval Record does not undermine the presumption that all eligible commissioners meaningfully participated in the remand determination. The Action Jacket Approval Record is simply a sheet of paper indicating that each commissioner, with the exception of Commissioner Crawford, approved the remand views drafted by Chairman Bragg. *See* Action Jacket Approval Record, Pls.' Resp. to Remand Views, Ex. 1. Plaintiffs argue,

The vote sheet shows that neither Vice Chairman Miller nor any of the other three qualified sitting Commissioners adopted the remand determination as their own or reviewed the record evidence to respond to the Court's Order, let alone participated in any analysis on remand. The vote sheet shows that the other Commissioners merely approved of the procedural maneuver whereby only one Commissioner's views were submitted in response to the Court's remand Order.

Pls.' Resp. to Remand Views at 10. Plaintiffs, however, make inferences that this Court will not make. Rather, absent hard evidence to the contrary, the Court must presume that the commissioners would not have

approved submitting to the Court the remand views prepared by Chairman Bragg without an understanding of the determination's merits.⁴

The Court recognizes that Vice Chairman Miller wrote on the vote sheet, "I note for the record that I would have preferred an *institutional response* to this remand." Action Jacket Approval Record, Pls.' Resp. to Remand Views, Ex. 1 (emphasis added). This statement does raise flags. Nevertheless, considered in conjunction with the remand determination's pronouncement that the Commission submitted Chairman Bragg's views as *the Commission's* "Views on Remand" and with each commissioner's recorded approval on the vote sheet, Vice Chairman Miller's statement does not rise to the level of "a clear showing of misconduct or wrongdoing" necessary to override the presumption of regularity. See *Franklin Savings Ass'n*, 922 F.2d at 211.

On this record, it is not clear that the Commission on remand did not conduct a formal re-vote on the merits. It may be that Plaintiffs' concerns are justified, and that the deliberations did not include all of the sitting Commissioners as contemplated by the statute. But the Court will not presume misconduct based on suspicion alone. The evidence does not clearly show that the full Commission did not meaningfully participate in the remand in accordance with 19 U.S.C. § 1516a(c)(3), the case law, and this Court's remand order.⁵ Finally, we note that, because we are remanding the decision for the reasons explained below, Plaintiffs will, in any event, be afforded the full Commission's reconsideration of the merits of the injury determination.

⁴ The Court notes that the Action Jacket Approval Record indicates that Vice Chairman Miller also approved the remand views drafted by Chairman Bragg. This seems inconsistent with the remand determination's indication that Miller maintained her dissent. See Remand Determination at 1 n.1. Interpreting the evidence as a whole, however, the Court must presume that Vice Chairman Miller approved submitting to the Court the remand views of Chairman Bragg as the Commission's remand determination because the draft noted her dissent. Seen in this light, there is no inconsistency.

⁵ Plaintiffs offer additional arguments in support of their belief that the Commission's proceedings on remand violated the spirit of the Court's remand order. See Pls.' Resp. to Remand Views at 11-14. In reviewing Plaintiffs' arguments, the Court notes that "[t]he Commission has broad discretion in fashioning its procedures." *Metallwerken*, 14 CIT at 490, 744 F. Supp. at 288 (citing *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940)). Moreover, as discussed above, the presumption of regularity dictates that, "in the absence of clear evidence to the contrary, courts presume that [agency officials] have properly discharged their official duties." *Chemical Foundation*, 272 U.S. at 14-15.

Plaintiffs first argue that the Commission failed to provide public notice of its remand proceeding. See Pls.' Resp. to Remand Views at 11. Such notice was unnecessary, however, as the Court's previous opinion notified the parties of the remand. See *Taiwan I*, 23 CIT at ___, 59 F. Supp. 2d at 1336-37.

Plaintiffs next argue that the Commission failed to "offer interested parties an opportunity to be heard[.]" Pls.' Resp. to Remand Views at 11. As mentioned above, however, antidumping proceedings are investigatory, rather than adjudicatory, in nature. See SAA at 892; see also *NEC Corp. v. United States*, 21 CIT 933, 948-49, 978 F. Supp. 314, 329 (1997). Accordingly, the Commission permissibly interprets its role in conducting an investigation as fact-finding. See U.S. Int'l Trade Comm'n, *Guidelines for Hearings*, Pub. 3183, at 1 (Mar. 1999). In remanding this matter, the Court did not order the Commission to reopen the record for the gathering of further evidence. See *Taiwan I*, 23 CIT at ___, 59 F. Supp. 2d at 1336-37. Therefore, it was within the Commission's discretion not to solicit further comments from interested parties on remand.

Finally, Plaintiffs argue that the Commission improperly refused to permit briefs and exhibits that Plaintiffs had previously submitted to this Court to be added to the record of the remand proceeding. See Pls.' Views on Remand at 11, 12-13. As noted, however, the Court did not instruct the Commission to reopen the record. Moreover, Plaintiffs' case briefs presumably contained arguments that the Commission had already heard. See 28 U.S.C. § 2637(d) (requiring the exhaustion of administrative remedies). Lastly, because the exhibits Plaintiffs presented at oral argument before this Court on May 26, 1999, were merely charts constructed using data already on the record, it was within the Commission's discretion to decide whether to receive them. See *Maine Potato Council v. United States*, 9 CIT 293, 300, 613 F. Supp. 1237, 1244 (1985) ("It is within the Commission's discretion to make reasonable interpretations of the evidence[.]").

2. *Is the Commission's remand determination supported by substantial evidence and otherwise in accordance with law?*

The Court must sustain the Commission's remand determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

A. Background

The statute directs the Commission to "make a final determination of whether * * * an industry in the United States * * * is materially injured * * * by reason of [the subject] imports[.]" 19 U.S.C. § 1673d(b). "The term 'material injury' means harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A). Moreover, the "by reason of" language "mandates a showing of causal—not merely temporal—connection between the [subject imports] and the material injury." *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997). In turn, the causation standard "requires adequate evidence to show that the harm occurred 'by reason of' the [subject] imports, not by reason of a minimal or tangential contribution to material harm[.]" *Id.* at 722.⁶

In examining "whether [the subject] imports have caused material injury to a domestic industry," the Commission is required under 19 U.S.C. § 1677(7)(B) to consider three factors: (1) the volume of the subject imports; (2) the effect of the subject imports on prices of domestic like products; and (3) the impact of the subject imports on domestic producers of like products.⁷ *Id.* at 719. The Commission evaluates the volume and price effects of the subject imports and their consequent impact on the domestic industry by applying the standards set forth in 19 U.S.C. § 1677(7)(C).⁸ See *U.S. Steel Group v. United States*, 96 F.3d 1352, 1360 (Fed. Cir. 1996); see also Agreement on Implementation of Article VI of

⁶ Following the Federal Circuit's decision in *Gerald Metals*, 132 F.3d 716, this Court ordered the Commission to reconsider its affirmative material injury determination concerning imports of pure magnesium from the Ukraine. See *Gerald Metals, Inc. v. United States*, 22 CIT ___, 8 F. Supp. 2d 861 (1998). This Court then sustained the Commission's subsequent remand determination. See *Gerald Metals, Inc. v. United States*, 22 CIT ___, 27 F. Supp. 2d 1351 (1998), appeal dismissed for appellant's failure to prosecute in accordance with Federal Circuit Rule 31(a), No. 99-1166 (Fed. Cir. Apr. 16, 1999). Although in *Gerald Metals* the Federal Circuit and this Court interpreted the statute as it existed prior to the enactment of the Uruguay Round Agreements Act ("URAA") on January 1, 1995, the "by reason of" standard articulated therein applies to the amended statute. See *Taiwan I*, 23 CIT at ___, 27 F. Supp. 2d at 1329.

⁷ In addition, the Commission "may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports." 19 U.S.C. § 1677(7)(B)(ii).

⁸ The relevant portions state:

(i) Volume

In evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.

(ii) Price

In evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether—

(I) there has been significant price underselling by the imported merchandise as compared with the price of like products of the United States, and

(II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

(iii) Impact on affected domestic industry

In examining the impact required to be considered under subparagraph (B)(i)(III), the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to—

(I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,

(II) factors affecting domestic prices,

Continued

the General Agreement on Tariffs and Trade 1994 (Antidumping) at Art. 3.1 ("Antidumping Agreement").

"Thus, after assessing whether the volume, price effects, and impact of the subject imports on the domestic industry are significant, the statutory 'by reason of' language implicitly requires the Commission to 'determine whether these factors as a whole indicate that the [subject] imports themselves made a material contribution to the injury.'" ⁹ *Taiwan I*, 23 CIT at ___, 59 F. Supp. 2d at 1327-28 (quoting *Gerald Metals*, 22 CIT at ___, 27 F. Supp. 2d at 1355); see also 19 U.S.C. § 1673d(b)(1). Accordingly, "the Commission must examine other factors to ensure that it is not attributing injury from other sources to the subject imports." SAA at 851-52.¹⁰

In reviewing the Commission's original determination, the Court could not discern how the Commission ensured that it did not attribute the harmful effects from other recognized factors to the subject imports. See *Taiwan I*, 23 CIT at ___, 59 F. Supp. 2d at 1335-36. Therefore, the Court remanded the Commission's affirmative injury determination for "reconsideration consistent with this Court's opinion." *Id.* at ___, 59 F. Supp. 2d at 1336. On remand, the Commission again determines that the industry in the United States producing SRAMs was materially in-

(III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,

(IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and

(V) in a proceeding under [19 U.S.C. §§ 1673-1673h], the magnitude of the margin of dumping.

The Commission shall evaluate all relevant economic factors described in this clause within the context of the business cycle and conditions of competition that are distinctive to the affected industry.

19 U.S.C. § 1677(7)(C).

⁹ The presence or absence of any factor is not necessarily dispositive to a finding of material injury. See 19 U.S.C. § 1677(7)(E)(ii). The Commission has discretion to weigh the significance of each factor in light of the circumstances. See *Iwatsu Electric Co., Ltd. v. United States*, 15 CIT 44, 49, 758 F. Supp. 1506, 1510-11 (1991).

¹⁰ In its remand determination, the Commission suggests that the non-attribution requirement is satisfied by assuring that the injurious effects ascribed to the subject imports are not "effects entirely caused" by other factors. Remand Determination at 9 n.34. In making this assertion, the Commission quotes an isolated sentence from the GATT 1947 Panel Report in the Norwegian Salmon case. See Imposition of Anti-dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, Apr. 27, 1994, GATT B.I.S.D. (41st Supp.) at 423 ("Norwegian Salmon"). The SAA endorses *Norwegian Salmon* as illustrative of a proper causation analysis. See SAA at 851.

Without more, however, a reliance on this isolated statement from *Norwegian Salmon* is misplaced. First, the GATT Panel's statement that it could not find that the Commission "had attributed to the Norwegian imports effects entirely caused" by other factors was made in direct response to Norway's argument that "any material injury to the [United States] Atlantic salmon industry" "was caused by factors other than imports from Norway." *Norwegian Salmon* at 423 (emphases added).

Second, this interpretation of the SAA's non-attribution requirement could render the statutory "by reason of" language meaningless. The statute's "by reason of" language indicates that the Commission cannot satisfy "its burden of proof by showing that the LTFV goods themselves contributed only minimally or tangentially to the material harm." *Gerald Metals*, 132 F.3d at 722 (emphasis added). To conclude that non-attribution merely requires the Commission to ensure that it does not attribute to the subject imports injury caused entirely by other factors, however, could allow the Commission to violate this language because overall injury to a domestic industry is often caused by a variety of factors. As explained by this Court,

Frequently, several events—each of which is a necessary antecedent and has an appreciable effect—contribute to overall injury to an industry. In some cases, another event may have such a predominant effect in producing the harm as to make the effect of the LTFV imports insignificant and, therefore, to prevent the LTFV imports from being a material factor. (This is not to say, however, that there may not be more than one material factor to injury.) In addition, even if no contributing factors independently have a predominant effect, their combined effect may dilute the effect of the LTFV imports, preventing the LTFV imports from being a material factor. The statute requires that the Commission determine whether the LTFV imports themselves made a material contribution to the injury suffered by the domestic industry.

Gerald Metals, 22 CIT at ___, 27 F. Supp. 2d at 1355 n.8.

"That the injurious effects from other sources may be greater than the effect of the subject imports is not determinative, [however,] so long as the Commission reasonably finds that the subject imports' contribution to the overall harm is material." *Taiwan I*, 23 CIT at ___, 59 F. Supp. 2d at 1330-31. "[T]he Commission need not weigh (i.e., determine which is greater or lesser) causes in complying with the 'by reason of' standard." *Id.* at ___, 59 F. Supp. 2d at 1331.

jured by reason of imports of SRAMs from Taiwan that the Department of Commerce found were sold at LTFV. See Remand Determination at 1.

B. Volume Effects

The statute requires the Commission to determine "whether the volume of [the subject imports], or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." 19 U.S.C. § 1677(7)(C)(i)(emphasis added). "This language when read in conjunction with the legislative history indicates that disjunctive language was chosen to signify congressional intent that the agency be given broad discretion to analyze import volume in the context of the industry concerned." *USX Corp.*, 12 CIT at 848, 698 F. Supp. at 238 (1988)(quoting *Copperweld Corp. v. United States*, 12 CIT 148, 167, 682 F. Supp. 552, 570 (1988)); see also S. Rep. No. 96-249, 96th Cong., 1st Sess. at 88 (1979).

In its original determination, the Commission evaluated the significance of the subject imports' volume in both absolute and relative terms, without indicating whether its determination relied upon both findings. See Final Determination at 33-34. In *Taiwan I*, the Court sustained the Commission's finding that the subject imports' nearly three-fold increase in absolute volume was significant. See *Taiwan I*, 23 CIT at ___, 59 F. Supp. 2d at 1331. The Court could not, however, "sustain the Commission's additional conclusion that the subject imports' increase relative to U.S. consumption was significant." *Id.* The record evidence indicated that non-subject imports of SRAMs greatly exceeded the imports of Taiwanese SRAMs in terms of both absolute and relative increases in volume¹¹ and were recognized by the Commission as a potential source of injury to the domestic industry. See *id.* at ___, 59 F. Supp. 2d at 1331-32. Therefore, "without an explanation of how the relatively small volume of Taiwanese imports was significant given the dominant presence of non-subject imports," the Court could not sustain the Commission's additional conclusion that the subject imports' increase relative to U.S. consumption was significant. *Id.* at ___, 59 F. Supp. 2d at 1332.

On remand, the Commission clarifies that its determination was not dependent on its finding of relative significance; rather, its finding that the absolute increase in subject imports was significant alone supported its determination regarding the volume factor. See Remand Determination at 5. As mentioned, the Court previously held that substantial evidence supported the Commission's conclusion that the absolute increase in imports of Taiwanese SRAMs was significant. See *Taiwan I*, 23 CIT at ___, 59 F. Supp. 2d at 1331. Therefore, recognizing that the Commission has discretion to analyze the volume of subject imports in either an absolute or relative sense, the Court sustains the Commis-

¹¹ Throughout the period of investigation, non-subject imports maintained a much higher U.S. market share than Taiwanese imports. See Staff Report (List 2, Doc. 34) at IV-9, Table IV-4 ("Staff Report").

sion's conclusion that the overall volume of subject imports was significant as supported by substantial evidence.¹²

C. Price Effects

1. Introduction

The statute provides that, in evaluating the effect of the subject imports on domestic prices,

[T]he Commission shall consider whether—(I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

19 U.S.C. § 1677(7)(C)(ii).

The Court previously sustained as supported by substantial evidence the Commission's conclusion that there was significant price underselling by the Taiwanese imports. See *Taiwan I*, 23 CIT at ___, 59 F. Supp. 2d at 1333. The Court could not, however, sustain the Commission's conclusion that the Taiwanese imports had significant price depressing effects during 1996 and 1997 as supported by substantial evidence.¹³ See *id.* at ___, 59 F. Supp. 2d at 1333-36.

First, the Court expressed concern that "the Commission found that the subject imports had significant price depressing effects despite the fact that the record indicate[d] that during 1996 and 1997 the majority of the Taiwanese imports *oversold* the domestic product." *Taiwan I*, 23 CIT at ___, 59 F. Supp. 2d at 1333. The Commission collected price information for six SRAM products, designating them products 1 through 6. Newer Taiwanese products 1 and 2, which accounted for less than

¹² Because substantial evidence supports the Commission's conclusion that the volume of the subject imports was significant based on its determination regarding absolute volume alone, the Court need not address the Commission's additional determination regarding the imports' relative volume. Nevertheless, the Court notes an argument raised by the Commission on remand in connection with the Court's prior instruction for the Commission to explain "how the relatively small volume of Taiwanese imports was significant given the dominant presence of non-subject imports[.]" *Taiwan I*, 23 CIT at ___, 59 F. Supp. 2d at 1332. Addressing the Court's instruction, the Commission states,

The *Norwegian Salmon* panel holds that there is "not . . . a requirement that imports from third countries not subject to investigation be considered as part of an examination of the significance of an increase in the volume of imports from a country whose imports [are] the subject of an anti-dumping duty investigation."

Remand Determination at 4 (citing *Norwegian Salmon* at 406). Thus, the Commission argues that a comparison of the respective volumes of the Taiwanese and non-subject imports was not required to evaluate the significance of the Taiwanese imports' relative volume.

If the Commission evaluates the significance of the subject imports without regard to causation, such a comparison may indeed not be necessary. Cf. *Angus Chemical*, 140 F.3d 1478, 1485 (Fed. Cir. 1998) (indicating that, under a two-step method of causation, the statutory factors of 19 U.S.C. § 1677(7)(B) may be evaluated before conducting "the additional analytical step of determining the precise causal connection between the imports and any perceived harm to the industry"). But see *Taiwan I*, 23 CIT at ___, 59 F. Supp. 2d at 1332 n.12.

In determining the ultimate issue of causation, however, it may be necessary to consider large volumes of non-subject imports. The SAA specifically endorses the causation standard employed in *Norwegian Salmon*. See SAA at 861. In the sentence immediately following the Commission's above quote, the GATT panel states, "A consideration of the volume of imports from . . . third countries might be relevant for the purpose of determining the existence of a causal relationship between the allegedly dumped imports under investigation and material injury to a domestic industry." *Norwegian Salmon* at 406. Moreover, the Antidumping Agreement explicitly states,

The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include . . . the volume and prices of imports not sold at dumping prices . . .

Antidumping Agreement at ¶ 3.5 (emphasis added).

¹³ The years 1994 through 1997 encompass the period of investigation. Nevertheless, the Commission permissibly focuses on the more recent 1996-97 period in evaluating the causal effects of the subject imports. See, e.g., *Chr. Bjelland Seafoods A/S v. United States*, 19 CIT 35, 48 (1996).

25% of Taiwanese imports in 1996 and less than 33% in 1997, significantly undersold the equivalent domestic products during 1996 and 1997. See Staff Report at V-6 to V-8, Tables V-1 and V-2. Older Taiwanese products 3 and 5, however, accounted for over 50% of Taiwanese imports in 1996 and over 67% in 1997, and generally oversold the equivalent domestic products during those years. See *id.* at V-9 to V-10, Table V-3, and at V-13 to V-14, Table V-5.

Second, the Court could not discern how the Commission ensured that it did not attribute the harmful effects from other recognized sources of price depression in the U.S. SRAM market to the subject imports. See *Taiwan I*, 23 CIT at ___, 59 F. Supp. 2d at 1335-36; see also SAA at 851-52. In the original determination, the Commission acknowledged that a learning curve, oversupply, and non-subject imports also had price depressing effects on the prices of domestic SRAMs. See Final Determination at 35, 37. Yet the Commission simply concluded that the subject imports themselves had significant price depressing effects without explaining the basis for that conclusion, despite the extensive evidence of these other known sources of price depression. See *Taiwan I*, 23 CIT at ___, 59 F. Supp. 2d at 1336.

The Commission's remand determination attempts to address the Court's concerns.

2. Analysis

a) Price Depressing Effects of Taiwanese SRAM Imports

On remand, the Commission continues to focus on the newer products 1 and 2, but now offers a more thorough explanation of their unique importance. See Remand Determination at 12-13. The Commission explains that "the health of the industry depends upon its success in new products" because, "in the initial period of selling a more advanced version or new generation of a product, firms enjoy a price premium." *Id.* (citing Final Determination at 22). Therefore, the Commission reasons, the substantial underselling by Taiwanese imports in newer products 1 and 2 took on even greater importance because it impaired the domestic industry's ability to charge expected premium prices. See *id.*

Regarding product 1, the Commission states, "In the first nine months after the entry of Taiwan imports into the market for Product 1 [in April of 1995], the Taiwan price fell to about half of its original value, maintaining a margin generally about 40 percent below the U.S. price." *Id.* (citing Staff Report at V-6 to V-7, Table V-1). Over the course of the following three months, the Commission elaborates, the price declines of Taiwanese product 1 became "even more radical," falling to less than one-third of its December 1995 unit price in February 1996. See *id.* at 12-13 (citing Staff Report at V-6 to V-7, Table V-1). Throughout this overall period, "[d]omestic prices fell precipitously." *Id.* at 13 (citing Staff Report at V-6 to V-7, Table V-1). The record supports the Commission's assertions regarding the pricing of product 1. See Staff Report at V-6 to V-7, Table V-1. Therefore, based on the record, a reasonable

mind could conclude, as did the Commission, that the significant underselling of Taiwanese product 1 depressed U.S. prices.

The Commission characterizes the pricing of Taiwanese product 2 as "even more stark[.]" Remand Determination at 13. The Commission notes that Taiwanese imports of product 2 entered the United States two months after the U.S. industry had introduced the product and "at a price that was one-seventh the domestic product price." *Id.* (citing Staff Report at V-8, Table V-2). The domestic product price fell by almost two-thirds during the following three months and "declined further by the end [of 1997]." *Id.* (citing Staff Report at V-8, Table V-2). Throughout this period, the Commission continues, Taiwanese product 2 consistently undersold the domestic product. *Id.* (citing Staff Report at V-8, Table V-2). The record supports these assertions. See Staff Report at V-8, Table V-2. Therefore, based on the record, a reasonable decision maker could conclude, as did the Commission, that the significant underselling of Taiwanese product 2 depressed U.S. prices.

In addition, the Commission explains on remand that the more established Taiwanese products 3 and 5 also had price depressing effects, despite the fact that these products exhibited "mixed overselling and underselling in 1996-97."¹⁴ See Remand Determination at 14-15. Addressing product 3, the Commission explains, citing another investigation, "in a commodity market characterized by intense price-based competition, a mixed pattern of under- and overselling is to be expected; such a pattern, together with increasing volume of subject imports, indicates that subject imports played a substantial role in the price declines * * *." *Id.* at 15 (citing *Certain Stainless Steel Plate from Belgium, Canada, Italy, Korea, South Africa, and Taiwan*, Inv. Nos. 701-TA-376, 377, and 379 (Final) and Inv. Nos. 731-TA-788-793 (Final), USITC Pub. 3188, at 19 (May 1999)).

Applying this observation to the current case, the Commission concludes that Taiwanese product 3 had price depressing effects because its volume increased and it "undersold the domestic product in between one-quarter and one-third of comparisons" in 1996-97. *Id.* at 15 (citing Staff Report at V-9, Table V-3). The record, however, also supports the opposite conclusion. Margins of Taiwanese overselling and underselling in product 3 fluctuated substantially over 1996 and 1997, yet domestic product 3 prices declined fairly steadily and consistently over this period. See Staff Report at V-10, Table V-3. Thus, an analysis of the causal nexus between Taiwanese pricing of product 3 and the domestic product 3 price declines requires an interpretation of the evidence. The Commission has "discretion to make reasonable judgments and inferences in interpreting evidence[.]" *Chung Ling Co., Ltd. v. United States*, 16 CIT 843, 846, 805 F. Supp. 56, 61 (1992)(citing *Maine Potato Council*, 9 CIT at 300, 613 F. Supp. at 1244).

¹⁴ Taiwanese product 3 oversold the domestic product 3 in seven months of 1996 and in ten months of 1997. See Staff Report at V-10, Table V-3. Taiwanese product 5 oversold the domestic product 5 in seven months of 1996 and in eight months of 1997. See *id.* at V-14, Table V-5.

Moreover, we need not belabor whether substantial evidence supports the Commission's conclusion regarding the effects of Taiwanese product 3; the Commission's explanation of Taiwanese product 5's effects adequately addresses the Court's previous concern regarding the Commission's finding of significant price depressing effects despite the fact that the majority of the Taiwanese imports oversold the domestic product during 1996-97.

Regarding product 5, the Commission explains, "In analyzing the effects of subject imports on domestic prices of Product 5, confirmed lost revenue findings are more probative than underselling." Remand Determination at 15. The Commission points out that a "substantial number of lost revenue allegations for [product 5] were confirmed[,] " dating from the fourth quarter of 1995 through 1997. *Id.* at 15-16 (citing Staff Report at V-24 to V-28, Table V-8). Based on the evidence of confirmed lost revenue allegations, the Commission concludes that U.S. producers had to "significantly lower[] their prices to avoid losing sales to [Taiwanese product 5]." *Id.* at 16. Also with regard to product 5, the Commission notes "that there is no possibility of false attribution of [price] effects where allegations of losses due to Taiwan imports have been confirmed." *Id.*

The record indicates that only one U.S. SRAM producer made the lost revenue allegations concerning Taiwanese product 5. *See* Staff Report at V-24 to V-28, Table V-8. Moreover, all but one of the confirmed lost revenue allegations involved the same purchaser. *See id.* Nevertheless, the confirmed lost revenue allegations are at least reasonably indicative of price depression; in each case, the U.S. producer lowered its initial price to avoid losing a sale to Taiwanese imports of product 5. *See id.*

Accordingly, substantial evidence supports the conclusion that the subject imports as a whole generally had price depressing effects. The precise issue, however, is whether the price depressing effects were "significant." *See* 19 U.S.C. § 1677(7)(C)(ii).

b) Other Sources of Price Depression

In examining causation, the Commission must not attribute the harmful effects from other sources of injury to the subject imports. *See* SAA at 851-52. The Commission further bases its remand determination that the subject imports themselves had significant price depressing effects on its explanation of how it ensured that it did not attribute the price effects from the other recognized factors (i.e., the learning curve, non-subject imports, and the 1996-97 oversupply) to the subject imports.

i) The Learning Curve

The learning curve is the phenomenon by which a firm's manufacturing costs, and hence its prices, decrease as it becomes more efficient in production. *See* Final Determination at 22. The record indicates that "SRAM prices historically show a pattern of steep price declines as the products move along market and production life cycles." Staff Report at I-20 and V-1. Addressing the effect of the learning curve on the domes-

tic prices for newer products 1 and 2, the Commission states, "Although the Commission did not adopt a fixed rate for the learning curve, the evidence before the Commission indicated that this process is more gradual than the precipitous falls in new-product prices that occurred during the later part of the POI." Remand Determination at 14.

The record evidence concerning the learning curve effect in the SRAM industry indicates that the price per bit falls approximately 38% every two years. See Staff Report at V-1; Feb. 18, 1998, Hearing Tr. (List 1, Doc. 252) at 37 ("Hearing Tr."). Domestic product 1 and 2 price declines over 1996 and 1997 were indeed faster than this rate. See Staff Report at V-6 to V-8, Tables V-1 and V-2. Therefore, substantial evidence supports the Commission's conclusion that the price depressing effects of the learning curve did not render the price depressing effects of the subject imports insignificant. The Commission has adequately explained how it ensured that it did not attribute the price depressing effects of the learning curve to the Taiwanese imports.

ii) Non-Subject Imports

Regarding the non-subject imports, the Commission appears to explain that it did not attribute price depressing effects of non-subject imports to the Taiwanese imports because the non-subject imports were not as competitive as the Taiwanese and domestic product in the U.S. market for fast SRAMs.¹⁵ The Commission explains,

[M]ore than half of the increase by quantity in non[-] subject imports in 1996-1997 came in imports from countries whose imports are predominantly concentrated in slower access speeds. In contrast, Taiwan imports, like domestic industry shipments, are heavily concentrated in higher access speeds. Of non[-]subject imports, only non-subject Korean imports are more concentrated in the market for fast SRAMs than in the market for slow SRAMs. Although the record does not indicate exactly in which SRAM products non[-]subject imports as a whole increased most, the market share of non-LTFV products from sources heavily concentrated in the slower range gained market share * * * from 1995 to 1997. In contrast, the market share of non-subject Korean imports decreased slightly[.]

Remand Determination at 9 (citing Staff Report at IV-3, Table IV-2, at I-10, Table I-1, and at IV-9, Table IV-4).¹⁶

Based on these findings, the Commission infers that, "in the part of the market in which the U.S. and Taiwan products compete[d], non[-]subject imports [did not have a] greater effect than subject imports." *Id.* at 9. Instead, "[n]onsubject imports appear to have had their

¹⁵ By inference, it appears the Commission considers "slow" SRAMs to be SRAMs of access speeds greater than or equal to 55 nanoseconds ("ns"), while it considers "fast" SRAMs to be those of access speeds less than or equal to 34 ns.

¹⁶ The non-subject imports as a whole were composed of non-subject imports from Korea and non-subject imports from all other countries, particularly Japan. See Staff Report at II-13. Henceforth, the Court will refer to the non-subject imports from all other countries as "third source" imports. The record indicates that, in 1997, 58.4% of non-subject Korean imports were in the fast range and 43.1% of third source imports were in the fast range. See Staff Report at I-10, Table I-1. As indicated in the above quote, the Commission characterizes the third source imports as "imports from countries whose imports are predominantly concentrated in slower access speeds." Remand Determination at 9.

greatest effects in [the market for slow SRAMs] in which Taiwan imports compete[d] very little and which represent[ed] a relatively low portion of shipments by the U.S. industry." *Id.* at 9-10. Thus, the Commission suggests that it did not attribute price depressing effects of non-subject imports to the Taiwanese imports because the non-subject imports were less competitive than the Taiwanese product in the U.S. market for fast SRAMs. *See also id.* at 10 n.41 ("That non[-]subject imports excluded subject imports and domestic products from [a part of the market] would set the stage for more intense competition between subject imports and domestic product in the part of the market open to them.") and 17. n.76 (stating that the Commission explained in its discussion of the relative volume of subject imports how it ensured "that it was not attributing the price effects of non[-]subject imports to subject imports").

Although there was no industry consensus on the definitions of "fast" and "slow" SRAMs, *see* Staff Report at I-9, the record adequately supports the Commission's finding of distinct market segments for fast and slow SRAMs in the United States,¹⁷ *see id.* at I-18 ("[I]nterchangeability across SRAMs with different access speeds can be problematic."). In addition, the record supports the Commission's conclusion that the Taiwanese imports and domestic product were concentrated in the market for faster SRAMs. *See id.* at I-10, Table I-1.

The record does not, however, support the Commission's apparent finding that non-subject imports were less competitive than Taiwanese imports in the domestic fast SRAM market. Instead, the great weight of the record evidence appears to indicate that, although a substantial portion of non-subject imports were concentrated in the U.S. market for slower SRAMs, non-subject imports were also very competitive in the U.S. market for fast SRAMs.

First, in terms of billions of bits, there were more than twice as many non-subject imports of fast SRAMs as a whole than Taiwanese fast SRAM imports in 1997. *See* Staff Report at I-10, Table I-1, and at IV-7, Table IV-3. The absolute volume in 1997 of third source fast SRAMs alone was much greater than those from Taiwan. *See id.* Moreover, in the fastest category of SRAMs (access speeds of 14 ns or less), there were more than three times as many non-subject imports as Taiwanese imports. *See id.* Finally, in 1997, fast non-subject Korean imports constituted 69.7% of total non-subject Korean imports by value, while fast third source imports constituted 75.2% of total third source imports by value. *See id.* at I-10, Table I-1.

¹⁷ Plaintiffs argue that the Commission cannot legally rely on its distinct market segment explanation because the Commission in its original determination had already found no "clear dividing line" between fast and slow SRAMs in finding a single "domestic like product" consisting of SRAMs of all access speeds. *See* Pls. Resp. to Remand Views at 16 (citing Final Determination at 10). It is permissible, however, for the Commission to consider the importance of distinct market segments as a condition of competition in its analysis of causation despite a finding of a single domestic like product under 19 U.S.C. § 1677(10). *See Bic Corp. v. United States*, 21 CIT 448, 452-54, 964 F. Supp. 391, 397-98 (1997); *R-M Indus., Inc. v. United States*, 18 CIT 219, 226 n.9, 848 F. Supp. 204, 210 n.9 (1994). Indeed, an analysis of market segments plays an important role in the causation context because "the more fungible two products are, the more likely underselling by one will affect the price of another." *Bic Corp.*, 21 CIT at 456, 964 F. Supp. at 400.

In addition, the record indicates that non-subject imports, particularly third source, were dominant in cache memory uses—functions that utilize fast SRAMs. *See id.* at I-11. For instance, non-subject imports were dominant in the market for cache memory in personal computers ("PCs"), "[o]ne of the largest end uses for SRAMs[.]" *Id.* at II-3. According to the Staff Report, "competition in much of the PC cache market [is limited] to those SRAM suppliers selected by Intel." *Id.* In turn, Intel purchased over 90% of its SRAMs from Japanese and non-subject Korean sources in 1997. *See id.*; *see also id.* at II-13. Thus, the record indicates that non-subject imports were very competitive in the U.S. market for PC cache memory,¹⁸ a market that chiefly utilized SRAMs of the fastest category in 1997. *See id.* at I-13, Table I-2.

Moreover, the record indicates that the U.S. market for workstations and servers chiefly utilized SRAMs of the fastest category in 1997. *See id.*; *see also id.* at II-4 ("Workstations and servers also consume a large amount of SRAM, and account for a large percentage of the value of SRAM sales. These applications use very high-end, high-speed SRAMs[.]") and at II-13. Addressing the sources of products in this market segment, the record states, "This segment is predominantly supplied by SRAMs produced in the United States and non-subject imports, particularly from Japan, although importers of SRAMs from Taiwan reported some shipments in this category." *Id.* at II-4; *see also id.* at II-13. By value, 37.4% of U.S. SRAM shipments in 1997 were used in workstations and servers, the largest end-use for domestic SRAMs by value. *See id.* In contrast, only 1.4% of Taiwanese SRAMs by value were employed in workstations and servers in the U.S. market in 1997. *See id.* at II-2. Thus, the record indicates that non-subject imports were more competitive than the Taiwanese imports in the domestic industry's greatest end-use market by value, a market that utilized SRAMs of the fastest category. *See also id.* at II-9 and at II-12 ("Imports from Taiwan are used in a smaller range of end uses than U.S.-produced SRAMs.").

By contrast, Taiwanese imports by value were concentrated in the U.S. market for modems and telecommunications applications in 1997, *see id.* at II-2, Table II-1, end-uses that primarily employ SRAMs of the next fastest speed category (access speeds of 15-34 ns), *see id.* at I-13, Table I-2. Even in the 15-34 ns access speed range, however, the non-subject imports maintained a greater absolute volume in the U.S. market than the Taiwanese imports. *See id.* at I-10, Table I-1, and at IV-7, Table IV-3.

Finally, the record's discussion of substitution elasticities also demonstrates that non-subject imports were competitive in the U.S. market segment for fast SRAMs. The substitution elasticity "reflects how easily purchasers switch from the U.S. product to the subject product (or vice versa) when prices change." Staff Report at II-15 n.29. The record indicates that non-subject, domestic, and Taiwanese SRAMs were all within

¹⁸ Meanwhile, 22.2% of Taiwanese imports by value were used as PC cache memory in 1997. *See* Staff Report at II-2, Table II-1.

the same range of substitutability with one another, *see id.* at II-15 and at II-15 n.30; therefore, the record indicates that they were all fungible with one another. This evidence further undermines the Commission's distinct market segment finding.

The Court presumes the Commission considered all of the evidence in the record. *See Nat'l Ass'n of Mirror Mfrs. v. United States*, 12 CIT 771, 779, 696 F. Supp. 642, 648 (1988). Nevertheless, without more, the Court cannot conclude that the record as a whole supports the Commission's apparent finding on remand that non-subject imports were not significantly competitive in the market segment in which domestic and Taiwanese SRAMs were concentrated. While the Commission has "discretion to make reasonable judgments and inferences in interpreting evidence[.]" *Chung Ling*, 16 CIT at 846, 805 F. Supp. at 61, it must nevertheless "examine the relevant data and articulate a satisfactory explanation for its action * * * [.]" *Motor Vehicle Mfg. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Absent greater explanation, it appears that the Commission "failed to articulate a 'rational connection between the facts found and the choice made.'" *Bando Chemical*, 16 CIT at 136, 787 F. Supp. at 227 (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974)), *aff'd*, 26 F.3d 139 (Fed. Cir. 1994).

More specifically, the record also supports the conclusion that non-subject imports had price depressing effects on domestic prices for newer products 1 and 2, the very products for which the Commission emphasizes underselling by Taiwanese imports.¹⁹ *See* Remand Determination at 12. The record indicates that non-subject Korean imports also undersold the domestic product in products 1 and 2.²⁰ *See* Prehearing Staff Report (List 2, Doc. 11) at V-5 to V-6, Table V-1, and at V-7, Table V-2 ("Prehearing Staff Report").

Addressing the underselling by the non-subject Korean imports, the Commission states, "[W]here price comparisons for comparable speed products are available, they show that Taiwan imports generally under-

¹⁹ In its original determination, the Commission explained the importance of new SRAM products as follows:

[T]he SRAM market is characterized by the frequent introduction of more advanced versions or generations of the domestic like product, which then tend to replace existing products. The first producer to market a superior product * * * often enjoys favorable pricing for a certain period. As other producers enter the market and production efficiencies are achieved, however, prices are driven down, and the product in question changes in character from a high value-added product to a commodity-type product.

Final Determination at 21-22; *see also* Staff Report at I-20.

²⁰ Regarding product 1, the record indicates that the producer of non-subject Korean imports was the first firm to introduce the product in the United States. *See* Prehearing Staff Report at V-5, Table V-1. U.S. firms marketed product 1 domestically four months later; Taiwanese firms marketed product 1 in the United States five months later. *See id.* That a Korean firm was the first to market product 1 in the United States suggests that that firm was the one that could have reasonably expected to receive a price premium. Moreover, the non-subject Korean imports entered the U.S. market at a price lower than the introductory Taiwanese product 1 price and less than one-half of the introductory domestic price. *See id.* Although Taiwanese product 1 subsequently undersold non-subject Korean product 1 in 1996 and 1997, non-subject Korean imports of product 1 substantially outsold the U.S. and Taiwanese product in terms of volume during these years. *See id.* at V-5 to V-6, Table V-1.

As explained by the Commission, prices are driven down from the price premium level as additional suppliers enter the market. *See* Final Determination at 22. Consistent with this theory, the record shows that the sharpest relative price decline in the U.S. price for product 2 occurred immediately after the introduction of non-subject Korean product 2. *See* Prehearing Staff Report at V-7, Table V-2. In contrast, the relative price declines in U.S. product 2 during the prior two months—when it only competed with Taiwanese versions of product 2—were not nearly as great. *See id.* The non-subject Korean imports also consistently undersold U.S. product 2, although by lesser margins than the Taiwanese product. *See id.*

sold non[-]subject imports." Remand Determination at 10 (citing Prehearing Staff Report at V-5 to V-6, Table V-1, and at V-7, Table V-2). The record does indicate that the Taiwanese imports undersold the domestic product by greater margins than the non-subject Korean imports. See Prehearing Staff Report at V-5 to V-6, Table V-1, and at V-7, Table V-2. From this evidence, the Commission concludes that the Taiwanese imports "tended to put downward price pressure on both the domestic industry and those non[-]subject imports with which they competed." Remand Determination at 10.

The Commission has "discretion to make reasonable judgments and inferences in interpreting evidence[.]" *Chung Ling*, 16 CIT at 846, 805 F. Supp. at 61. The Commission makes this conclusion, however, in the context of its apparent finding that non-subject imports were less competitive in the fast SRAM market segment in which domestic shipments and Taiwanese imports were concentrated. See Remand Determination at 9-10. As discussed above, the Court cannot sustain that finding absent greater explanation. Therefore, inasmuch as the Commission's determination that the subject imports had significant price depressing effects relies on its market segment finding, as explained, the Court cannot sustain this determination.²¹

iii) Oversupply

As the Commission points out, demand for SRAMs is a derived demand and thus not price responsive (i.e., demand for SRAMs is inelastic). See Remand Determination at 6; see also Staff Report at II-5 to II-6. Thus, decreasing shifts in supply will tend to lead to price increases, while increasing shifts in supply will tend to lead to price decreases. Primarily because the U.S. industry had misforecast demand, the U.S. SRAM market experienced undersupply during 1995 and oversupply during 1996 and 1997. See Staff Report at V-3. Correspondingly, domestic SRAM prices "peaked in 1995" and "declined significantly" beginning in 1996. See *id.* On remand, the Commission continues to acknowledge the oversupply "caused by the industry's overestimation of demand" and its price depressing effects.²² See Remand Determination at 5, 6, and 17.

²¹ For instance, the Commission characterizes third source imports—those primarily from Japan—as "non-LTFV products from sources heavily concentrated in the slower (SRAM) range[.]" Remand Determination at 9. Yet, although the record does not contain pricing data for third source imports, it does indicate that these imports were very competitive, if not more competitive than the Taiwanese imports, in the market for SRAMs selling at premium prices. For example, regarding the U.S. market for SRAMs utilized in workstations and servers, the Staff Report states,

Workstations and servers also consume a large amount of SRAM, and account for a large percentage of the value of SRAM sales. These applications use very high-end, high-speed SRAMs that sell for premium prices. This segment is predominantly supplied by SRAMs produced in the United States and non-subject imports, particularly from Japan, although importers of SRAMs from Taiwan reported some shipments in this category.

Staff Report at II-4 (emphasis added); see also *id.* at II-13 ("Competition between non[-]subject SRAMs and subject imports is limited in the workstation market due to limited availability of qualified product for this segment from subject importers.")

²² In *Taiwan I*, the Court referred to the oversupply situation as "global oversupply." 23 CIT at ___, 59 F. Supp. 2d at 1335. In response, the Commission states on remand that its "discussion of oversupply was specific to the conditions in the U.S. market" and did not concern "the level of relative supply and demand around the world[.]" Remand Determination at 17. The Court clarifies that it, too, is only concerned with the oversupply situation in the U.S. market despite its use of the phrase "global oversupply" in the prior opinion.

In the original determination, the Commission recognized the oversupply situation of 1996-97 as a distinct market force that caused significant domestic price declines. See Final Determination at 23, 35, and 37. On remand, the Commission states, "[T]he record also suggests that global oversupply, whatever its extent may be, is not an undifferentiated factor whose influence on the United States market is independent of the particular importations that actually occur." Remand Determination at 17. Thus, the Commission apparently continues to conclude that, despite the oversupply situation, the subject imports themselves had distinct and significant price depressing effects.

If the Court could sustain the Commission's determination that the subject imports themselves had significant price depressing effects, this inference could be reasonable. As discussed above, however, see *supra* pp. 36-46, the Court cannot sustain that determination inasmuch as it relies on the Commission's market segment finding. Because the Commission's explanation of how it ensured that it did not attribute the effects of the 1996-97 oversupply period to the Taiwanese imports is tied to its determination that the Taiwanese imports themselves had significant price depressing effects, we cannot sustain this explanation at this time.

D. Impact

The statute directs the Commission to examine the consequent impact of the subject imports on the domestic industry. See 19 U.S.C. § 1677(7)(C)(iii). The Commission must consider "all relevant economic factors which have a bearing on the state of the industry in the United States, including but not limited to" those enumerated. See 19 U.S.C. § 1677(C)(iii); see also *supra* at n.8.

On remand, the Commission elaborates on its original findings with regard to the impact factor. See Remand Determination at 18. As discussed in the original determination, a condition of competition distinct to the domestic SRAM industry is that it "must make substantial ongoing investments in the research and development of new products and process technologies, and make substantial capital investments to upgrade fabrication equipment and facilities, in order to maintain competitiveness." Final Determination at 36. Therefore, the Commission explains, "the ability of [the domestic] industry to generate income is vital to its ability to make the ongoing investment necessary to remain competitive." Remand Determination at 19. For this reason, although the Commission considered all the factors enumerated in 19 U.S.C. § 1677(7)(C)(iii), it permissibly focused on the U.S. industry's operating income, capital expenditures, research and development ("R&D") expenditures.

The record indicates that the domestic industry earned significantly less operating income in 1996 than in either 1994 or 1995. See Staff Report at VI-7, Table VI-3. In 1997, the industry suffered operating losses. See *id.* In its original determination, the Commission explained that, "[a]s a result of the domestic industry's worsening financial condition, it

curtailed capital expenditures in 1997 to a level slightly less than half that of either 1995 or 1996." Final Determination at 37 (citing Staff Report at VI-11, Table VI-4). In addition, the Commission pointed out that "[t]he domestic industry's [R&D] expenditures also fell from 1996 to 1997, although the 1997 levels remained higher than in 1994 or 1995." *Id.* (citing Staff Report at VI-11, Table VI-4). On remand, the Commission continues to conclude that, because the industry is heavily dependent on continuing investment, these economic factors indicate that the U.S. SRAM industry was suffering present material injury. See Remand Determination at 20.

As the Commission acknowledges, despite the fact that the domestic industry invested less in capital and R&D in 1997 than the previous year, it nevertheless invested more in both categories in 1997 than it had in 1994, the beginning of the POI. See Staff Report at VI-11, Table VI-4. Therefore, it is possible that, rather than investing abnormally low amounts in 1997, the domestic industry in truth invested abnormally high amounts in 1995-96 due to its ability to earn substantially more revenue during the undersupply period of 1994-95. Nonetheless, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). The record at least reasonably leads to the conclusion that the domestic industry was suffering material injury.

The Commission must make a final determination of whether the domestic industry is materially injured "by reason of" the subject imports. 19 U.S.C. § 1673d(b)(1). The issue remaining, then, is whether "the [subject] imports themselves made a material contribution to the injury." *Taiwan I*, 23 CIT at ___, 59 F. Supp. 2d at 1327 (citing *Gerald Metals*, 22 CIT at ___, 27 F. Supp. 2d at 1355).

On remand, the Commission first states that the "relationship between [the confirmed revenue losses for product 5] and industry operating income [losses] * * * provides perhaps the most direct possible evidence of the significant effects of subject imports." Remand Determination at 19. The Commission explains, "For the period 1996-97, the industry's net operating loss was about \$30 million. In virtually the same period, confirmed revenue losses by U.S. producers to Taiwan imports alone amounted to more than \$40 million." *Id.*

The Commission calculates lost revenues from the equation: (**producer's initial U.S. price quote—U.S. price quote accepted by buyer**) X (**quantity sold**).²³ Four of the lost revenue allegations for product 5 had initial price quote dates of "4Q95-1Q97" (i.e., the fourth quarter of 1995 through the first quarter of 1997). See Staff Report at V-27, Table V-8. Domestic prices for product 5, however, were steadily declining from the fourth quarter of 1995 through the beginning of

²³ For example, assume a U.S. producer initially quotes a price per unit of \$10, but a buyer is able to negotiate the price down to \$5 per unit. Consequently, if the producer sells 20 units to the buyer at the accepted price of \$5 per unit, the lost revenues would equal \$100.

1997. *See id.* at V-13 to V-14, Table V-5. Moreover, as discussed above, *see supra* p. 29, other factors were causing price declines. Consequently, the initial quote for each 4Q95-1Q97 allegation is substantially higher than the accepted quote, thereby potentially inflating the measurement of revenue lost due to competition from the subject imports. *See id.* at V-27, Table V-8. Combined, the four 4Q95-1Q97 allegations account for approximately 94% of all confirmed lost revenue allegations for product 5. *See id.*

The Commission concludes that the instances of lost revenues for product 5 had a significant negative impact on the domestic industry's operating income. Absent an explanation of how it was reasonable to rely on the 4Q95-1Q97 allegations in confirming lost revenues, however, the Court cannot sustain this conclusion as supported by substantial evidence.

In addition, the Commission bases its impact determination on the price depressing effects of the subject imports. The Commission explains that "the Taiwan underselling had its most direct influence on U.S. prices and volumes for new products." Remand Determination at 19. The Commission concludes that the significant price depressing effects of the subject imports directly contributed to the domestic industry's worsening financial performance in 1996 and 1997. *See id.* at 19-20. Consequently, the Commission explains, "The relative inability of the U.S. industry to gain sales of new products, at expected premium prices, * * * impair[ed] the U.S. industry's ability to afford further investment, since new products should make a disproportionate contribution to earnings." *Id.* at 19-20. The Commission concludes that, because the subject imports significantly contributed to lowering domestic prices levels, the subject imports themselves made a material contribution to the U.S. industry's poor financial condition. *See id.* at 20-21. As explained above, however, without more, the Court cannot sustain the Commission's determination that the subject imports themselves had significant price depressing effects. Therefore, we cannot sustain the Commission's affirmative injury determination.

CONCLUSION

Absent greater explanation, the Court cannot sustain the Commission's determination that the subject imports had significant price depressing effects inasmuch as the Commission based that determination on its finding that non-subject imports were less competitive than the subject imports in the U.S. market for fast SRAMs. Therefore, the Court cannot sustain the Commission's affirmative injury determination. Accordingly, the Commission's determination is remanded for reconsideration consistent with this Court's opinion. Remand is directed to the entire Commission.

The Commission shall complete its second remand determination by Friday, May 26, 2000; any comments or responses are due by Monday, June 12, 2000; and any rebuttal comments are due by Thursday, June 22, 2000.

(Slip Op. 00-38)

HOOGOVS STAAL BV AND HOOGOVS STEEL USA, INC., PLAINTIFFS v.
UNITED STATES, DEFENDANT

AK STEEL CORP., BETHLEHEM STEEL CORP., INLAND STEEL INDUS., INC., LTV
STEEL CO., INC., NATIONAL STEEL CORP., AND U.S. STEEL GROUP,
PLAINTIFFS v. UNITED STATES, DEFENDANT

Consolidated Court No. 96-10- 02394

[Commerce's Final Results of Redetermination Pursuant to Court Remand of anti-dumping duty administrative review that reimbursement of antidumping duties occurred are sustained; final judgment entered for defendant.]

(Decided April 12, 2000)

Powell, Goldstein, Frazer & Murphy LLP (Peter O. Suchman and Niall P. Meagher, Esqs.) for plaintiffs Hoogovens.

Skadden, Arps, Slate, Meagher & Flom LLP (Robert E. Lighthizer and John J. Mangan, Esqs.) for plaintiffs A.K. Steel, et al.

David W. Ogden, Acting Assistant Attorney General; David M. Cohen, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (Lucius B. Lau, Attorney); David R. Mason, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for defendant.

OPINION AND ORDER

I.

INTRODUCTION

WATSON, *Senior Judge*: In these consolidated antidumping duty actions, plaintiffs, foreign and domestic steel companies, move for judgment on the agency record under USCIT Rule 56.2 contesting certain aspects of the United States Department of Commerce's ("Commerce") Final Results of the first administrative review in *Certain Cold-Rolled Carbon Steel Flat Products from the Netherlands*; *Final Results of Antidumping Duty Administrative Review*, 61 Fed. Reg. 48,465 (Dep't of Commerce Sept. 13, 1996) ("*Final Results*"). The first administrative review of the antidumping duty order¹ was requested by Hoogovens and covered the period of August 18, 1993 through July 31, 1994.

In its *Final Results* Commerce, *inter alia*, invoked its "reimbursement regulation," 19 C.F.R. § 353.26 (1994), after finding that Hoogovens Staal BV, a Netherlands steel producer and exporter ("Hoogovens"), had reimbursed N.V.W. (USA), Inc. ("NVW"), the exporter's wholly-owned U.S. sales office and the importer of record, for payment of antidumping duties. The application of the regulation by Commerce in its *Final Results* significantly increased its finding of the margin of dumping, and hence, Hoogovens' antidumping duty liability.

¹ The antidumping duty order on certain cold-rolled carbon steel flat products from the Netherlands was issued by Commerce in August 1993. See *Antidumping Duty Order and Amendments to Final Determinations of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from the Netherlands*, 58 Fed. Reg. 44,172 (Dep't of Commerce August 19, 1993).

On March 13, 1998, Senior Judge Dominick L. DiCarlo sustained the *Final Results* in certain respects, including the validity of the regulation and Commerce's authority to apply it to related parties, both of which were vigorously contested by Hoogovens,² and remanded this case to Commerce solely "to reconsider whether reimbursement [of antidumping duties] occurred * * * and [if so] cite to evidence in the record that supports its decision." *Hoogovens Staal BV v. United States*, 4 F. Supp.2d 1213, 1221 (CIT March 13, 1998).

On January 27, 1999, Commerce's *Final Results of Redetermination Pursuant to Court Remand*, dated January 25, 1999 ("Remand Results"), were filed with the court. Thereafter, in accordance with an order dated February 26, 1999 establishing a schedule for filing comments on the *Remand Results*, the parties in this action submitted comments. Familiarity with the court's previous decision of Judge DiCarlo is presumed.³

Briefly, in the previous decision, the court found that aside from conclusory statements in the *Final Results* regarding reimbursement of antidumping duties, Commerce failed to identify the evidence of record upon which its conclusions were based, and failed "to articulate a reasoned basis for its decision." *Hoogovens*, 4 F. Supp. 2d at 1219. Specifically, the court observed: "The Hoogoven—NVW agreement includes no mention of antidumping duties or reimbursement. Although other documents on the record suggest that reimbursement was occurring, Commerce does not identify which evidence supports its finding of reimbursement." *Id.*

In its *Remand Results*, at 1, Commerce "continues to find that reimbursement of antidumping duties within the meaning of 19 C.F.R. § 353.26 has occurred in this case." Upon reconsideration of the evidence of record, including Hoogovens' submissions, Commerce "concludes that the actions taken by Hoogovens with respect to the payment of duties on entries during the period of review constitute reimbursement within the meaning of section 353.26 of the Department's regulations. *Id.* Thus, Commerce points out that Hoogovens conceded that it transferred funds to NVW for the payment of antidumping duty cash deposits, and that neither the agency agreement between Hoogovens and NVW nor any other evidence establishes any obligation on the part of NVW to repay Hoogovens any portion of those funds (which covered, indeed exceeded, the amount of antidumping duties actually calculated by the Department for final assessment). *Id.* at 15. As found by Commerce," [t]o the contrary, Hoogovens' statements on the record demonstrate that NVW was under no obligation to repay the funds provided by Hoogovens for the payment of antidumping duties, *i.e.*, Hoogovens assumed responsibility for the payment of antidumping duties." *Id.* Continuing, Commerce stresses in its *Remand Results* that its reading of the

² See note 4, *infra*, concerning this issue.

³ By order entered by the Chief Judge on July 28, 1999, this action previously assigned to Senior Judge DiCarlo, was reassigned to the writer.

agency agreement "is supported by Hoogovens' repeated statements that NVW served "merely as a sales agent and document processor and by Hoogovens' transfer of funds to NVW to pay antidumping duty cash deposits without a reciprocal obligation for NVW to repay such funds." *Id.* Accordingly, Commerce also found that the "plain meaning" of the agency agreement between Hoogovens and NVW created an obligation on the part of Hoogovens to reimburse the importer for antidumping duties.

II.

STANDARD OF REVIEW

In reviewing Commerce's *Remand Results*, the court will uphold such determination unless it is found "unsupported by substantial evidence on the record, or otherwise not in accordance with law." *The Thai Pineapple Public Co., Ltd. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999)(citing *Micron Technology, Inc. v. United States*, 117 F. 3d 1386, 1393 (Fed. Cir. 1997) (quoting 19 U.S.C. §1516a(b)(1)(B)(i). "Substantial evidence" is more than a mere scintilla and [it is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, taking into account the entire record, including whatever fairly detracts from the substantiality of the evidence." *Atlantic Sugar Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984). "Substantial evidence: has been defined as evidence "which could reasonably lead to [Commerce's] conclusion," so that the conclusion can be described as a "rational decision." *Matsushita Elec. Indus., Ltd. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). See also *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). As the court's prior opinion points out, Commerce's determination must be reviewed by the court on the basis of rationale articulated and evidence relied on by the agency and not on *post hoc* rationalization of counsel. *Hoogovens*, 4 F. Supp.2d at 1219, citing *Timken Co. v. United States*, 937 F. Supp. 953, 955 (1996).

III.

PARTIES' CONTENTIONS

Hoogovens asserts that the *Remand Results* are unsupported by substantial evidence and are otherwise contrary to law. Specifically, Hoogovens contends that Commerce misinterpreted the agency agreement between Hoogovens and NVW so as to place an obligation on the former to reimburse the latter for antidumping duties; that contrary to its existing practice, for its reimbursement determination, Commerce unlawfully relied solely on the transfer of funds to pay cash deposits for such duties (and credit memos evidencing the fund transfers); that Commerce ignored certain submissions by Hoogovens that demonstrate there was no reimbursement of antidumping duties; and that Commerce's determination reimbursement occurred was premature because it was made prior to the assessment of antidumping duties.

Defendant and the domestic steel producers posit that Commerce's *Remand Results* are supported by substantial evidence, *viz.*, that the plain language of the agency agreement required Hoogovens to pay (or reimburse the importer) for antidumping duties; that Hoogovens concededly transferred funds to the importer for payment of antidumping duty deposits without a reciprocal obligation to repay the funds; and that Hoogovens' own statements show that the role of its U.S. affiliate was solely that of a sales agent and document processor. Further, defendant and the domestic steel producers dispute that the determination is premature and that Commerce ignored any evidence submitted by Hoogovens.

IV.

DISCUSSION

A.

THE AGENCY AGREEMENT.

While the court held in its prior decision that the agreement includes no *mention* of antidumping duties or reimbursement, *Hoogovens*, 4 F. Supp. 2d at 1219, the court did not point to any language of the agreement expressly precluding an obligation on the part of Hoogovens to reimburse antidumping duties. Commerce finds in its *Remand Results* that Hoogovens' transfer of funds to NVW for payment of cash deposits without a reciprocal obligation to repay the funds is consistent with a reading of the agreement to require Hoogovens to pay or reimburse the importer for antidumping duties.

Commerce considered, and properly rejected, Hoogovens' arguments that the agreement must be interpreted in light of the fact that it was executed some ten years prior to the antidumping duty order, it makes no reference to antidumping duties, and there is an article of the agreement that would make the importer, not Hoogovens, responsible for paying any antidumping duties. The court agrees that Commerce's interpretation of the agreement in light of Hoogovens' actions and all the facts and circumstances was reasonable.

B.

OTHER EVIDENCE OF REIMBURSEMENT RELIED ON BY COMMERCE.

Significantly, in this case, Commerce's reimbursement determination does not purport to rest solely on the agency agreement, that undisputedly makes no specific reference to reimbursement or payment of antidumping duties. Indeed, in the court's prior opinion, after noting that the agreement does not mention antidumping duties or reimbursement, "other documents on the record suggest that reimbursement was occurring" *Hoogovens*, 4 F. Supp. 2d at 1219. In the *Remand Results*, Commerce relied on a *combination* of the agreement, the transfer of funds used by the importer for payment of antidumping duty deposits without a reciprocal obligation for repayment of the funds, and Hoogo-

vens' statements that NVW functioned only as a sales agent, document processor, and communications link.⁴ The court finds that foregoing combination of factual circumstances constitutes substantial evidence supporting the determination.

C.

HOOGOVENS' OTHER EVIDENCE ALLEGEDLY IGNORED BY COMMERCE.

The *Remand Results* at 16 (Public version) demonstrate that the submissions cited by Hoogovens claimed to show there was no reimbursement were specifically considered by Commerce:

With respect to the importer certifications filed under section 353.26(b) of the Department's regulations, normally the Department would find the importer certifications to be probative of whether an understanding or agreement exists for the purpose of reimbursing duties. However, where other, more compelling, evidence indicates that such certifications do not accurately reflect the arrangement between the exporter and the importer, the Department will not accord significant weight to such certifications.

Absent some showing to the contrary, the agency is presumed to have considered all the evidence of record. See *Ceramica Regiomontana v. United States*, 810 F.2d 1137, 1139 (Fed. Cir. 1987); *Torrington Co. v. United States*, 790 F. Supp. 1161, 1167-68 (CIT 1992); *Maine Potato Council v. United States*, 613 F. Supp. 1237, 1245 (CIT 1985). See also *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369, 70 (Fed. Cir. 1998); *Asociacion Columbiana de Exportadores de Flores v. United States*, 704 F. Supp. 1068, 1071 (CIT 1988). Moreover, "[t]hat plaintiff can point to evidence * * * which detracts from * * * [Commerce's] decision and can hypothesize a * * * basis for a contrary determination is neither surprising nor persuasive." *Matsushita Elec. Indus. Co.*, 750 F.2d at 936.

In should be noted that Commerce declined to accord significant weight to the certifications. In reviewing agency determinations, the

⁴In support of its *Remand Results*, Commerce repeatedly refers to Hoogovens' statement that its U.S. affiliate was simply a sales agent and document processor. Apparently, Hoogovens had stressed its relationship to the importer to Commerce in connection with Hoogovens' argument that application of the reimbursement regulation to related parties is punitive, not remedial, and hence, is inconsistent with the statutory and regularity scheme. See 4 F. Supp. 2d at 1216-17. Based largely on Commerce's new interpretation of its reimbursement regulation in *Color Television Receivers from the Republic of Korea*, 61 Fed. Reg. 4,408 (Dep't of Commerce 1996) and the court's deference to an agency's interpretation of its regulations, Judge DiCarlo upheld the validity of the regulation and its application to related parties. However, Hoogovens' argument to Judge DiCarlo that the regulation was invalid had previously been articulated by a unanimous Federal Circuit decision in *Torrington Co. v. United States*, 127 F.3d 1077, 1079 (1997), n. 2, which in *dicto* unequivocally opined: "When Commerce has once assessed an importer a duty to compensate for any [margin of dumping], the statute does not seem to authorize a further assessment of duty to the same importer on the theory that a foreign supplier has helped an importer with its duty burden. Once the duty is paid a single time to account for the economic consequences of dumping, further duties would seem punitive rather than necessary to bring market prices into some hypothetical balance. * * *." Significantly, the Federal Circuit reached the foregoing conclusions notwithstanding its recognition of "substantial deference to an agency's interpretation of its own regulations." (citation omitted), 127 F.3d at 1080.

The *Torrington dicta* was not mentioned by Judge DiCarlo in his opinion, but fundamentally, an appellate court's *dicta* no matter how well reasoned, has no binding or precedential effect—even in a court of inferior jurisdiction. Arguably, because the antidumping statute and its legislative history clearly reject the use of antidumping duties for punitive purposes, the court should have invalidated the regulation at least with respect to a wholly-owned subsidiary of the exporter. Nonetheless, with due respect to the well-reasoned contrary views expressed by our appellate court in *Torrington* as to the validity of the reimbursement regulation, since that issue was fully considered and decided by Judge DiCarlo, this court is constrained to treat Judge DiCarlo's holding as to the validity of the regulation as the law of the case.

court declines to reweigh or reinterpret the evidence of record. See *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1996) (noting that the substantial evidence standard "frees the reviewing courts of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute."). It is not the province of this court to review the record evidence to determine whether a different conclusion could be reached, but to determine whether Commerce's determination is supported by substantial evidence. As the Supreme Court has observed: "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo*, 383 U.S. at 619-20 (1966). See also *Arkansas v. Oklahoma*, 503 U.S. 91 (1992) (courts should not supplant agency's findings that are supported by substantial evidence merely by identifying alternative findings supported by substantial evidence); and *Inland Steel Industries, Inc. v. United States*, 188 F.3d 1349, 1359 (Fed. Cir. 1999), citing *P.P.G. Indus., Inc. v. United States*, 978 F.2d 1232, 1236 (Fed. Cir. 1992).

D.

COMMERCE'S ALLEGED SOLE RELIANCE ON PAYMENT OF CASH DEPOSITS.

The court has also considered Hoogovens' contention that the transfer of funds for cash deposits of antidumping duties to the importer are not *alone* sufficient to support a finding of reimbursement, since that approach would be contrary to Commerce's prior practice and judicial determinations. However, as stressed by defendant and the domestic steel producers, the *Remand Results* make it clear that Hoogovens' payment of cash deposits was only one factor in a combination of several factors showing that reimbursement had occurred.

E.

COMMERCE'S SUBSEQUENT REVIEWS.

The parties have referred to the final results of the administrative reviews covering subsequent periods in which Commerce determined there was no reimbursement of antidumping duties by Hoogovens. Fundamentally, of course, the records before Commerce in subsequent review periods are not part of the record of a prior review. *Hoogovens*, 4 F. Supp. 2d at 1218 ("Whatever additional information that persuaded Commerce that Hoogovens had discontinued its practice of reimbursing NVW during the second period of review was not a part of the record for this [first] review."). In any event, the facts and circumstances of the subsequent administrative review periods are quite distinguishable from those in the first administrative review.

Thus, in the final results of the second administrative review, 62 Fed. Reg. 18,476 (Dep't of Commerce April 15, 1997), which were before the court in *Bethlehem Steel Corp. v. United States*, 27 F. Supp. 2d 201, Commerce's determination there was no reimbursement of antidumping duties was sustained by the court based on evidence that: (1) Hoogovens

and its affiliated importer had revised their agency agreement, thereby making the importer solely responsible for paying any antidumping duties to be assessed; and (2) the importer had begun refunding to the producer antidumping duty cash deposits previously advanced. *See also* this court's recent decision in *Hoogovens Staal BV, et al. v. United States*, 86 F. Supp. 2d 1317 (CIT January 21, 2000), involving the third administrative review.

F.

HOOGOVENS' PREMATURETY CLAIM.

Hoogovens contends that a determination of reimbursement of antidumping duties is premature prior to the final margin calculation and assessment of antidumping duties. The contention has some superficial logical basis, but as explained by Commerce in the *Remand Results* at 17, Hoogovens simply ignores that the reimbursement determination must be made as part of the administrative review process and calculation of the total dumping margin by making the appropriate adjustment required by the regulation *prior to* the assessment of antidumping duties in liquidation of the entries. As pointed out by Commerce, the reimbursement regulation requires an adjustment of U.S. price in the final margin calculation, which adjustment must obviously be made prior to liquidation of the entries and assessment of antidumping duties, citing *PO Corp. v. United States*, 652 F. Supp. 724, 737 (CIT 1987). *See also Hoogovens*, 4 F. Supp. 2d at 1218 (recognizing that "as part of the final margin calculation, Commerce adjusts the U.S. price downward to reflect the amount of duty reimbursed to, or paid on behalf of, the importer.").

V.

CONCLUSION

For the foregoing reasons, the *Remand Results* are sustained, and final judgment will be entered for defendant.

(Slip Op. 00-39)

JEWELPAK CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94-04-00230

[Plaintiff's Motion for Summary Judgment is denied; Defendant's Motion for Summary Judgment is denied.]

(Dated April 13, 2000)

Fitch, King and Caffentzis, (James Caffentzis), for Plaintiff.

David W. Ogden, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice, (*Barbara S. Williams*); *Chi S. Choy*, Of Counsel, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, for Defendant.

I

INTRODUCTION

WALLACH, *Judge*: Plaintiff Jewelpak challenges a Customs classification of its merchandise, "presentation boxes" in which jewelry is shipped, stored, and sold. Jurisdiction is proper under 28 U.S.C. § 1581(a) (1994), and Customs' classification decision is therefore subject to de novo review under 28 U.S.C. § 2640(a)(1) (1994).

Customs classified all of the subject merchandise under subsection 4202.92.90¹ of the Harmonized Tariff Schedule of the United States ("HTSUS"), as jewelry boxes. Plaintiff contends that some of the boxes should be classified under subheading 3923.10.00,² plastic boxes for the conveyance of goods, and the others under subheading 7310.29.00,³ iron or steel boxes. Plaintiff's Memorandum in Support of Its Cross-Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment ("Plaintiff's Memorandum") at 1-2.

This case comes before the Court on cross-motions for summary judgment. The Court finds that a genuine issue of material fact exists, and

¹ 4202

Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper (con.):

Other (con.):

4202.92

With outer surface of sheeting of plastic or of textile materials (con.):

Other:

4202.92.90

Other:

²

3923

Articles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics:

3923.10.00

Boxes, cases, crates and similar articles.

³

7310

Tanks, casks, drums, cans, boxes and similar containers, for any material (other than compressed or liquefied gas), of iron or steel, of a capacity not exceeding 300 liters, whether or not lined or heat insulated, but not fitted with mechanical or thermal equipment:

7310.29.00

Of a capacity of less than 50 liters:

Other * * *

denies both motions for summary judgment. However, the Court further holds that the only issue for trial is whether the boxes are suitable for long term use. If they are, then the boxes are classifiable under the Government's provision, 4202.92.90, jewelry boxes. If they are not so suitable, the Plaintiff's propounded basket provisions apply.

II

BACKGROUND

Plaintiff is the importer of record. The merchandise at issue is boxes used in the shipment, promotion, display, and sale of jewelry. The boxes are of various shapes and sizes, designed to hold specific pieces of jewelry, including rings, bracelets, necklaces, and watches.

The shells of the boxes are plastic or metal. They are covered with textile material or plastic sheeting. Defendant's Statement of Undisputed Facts ("Defendant's Statement") ¶ 6; Plaintiff's Response to Defendant's Statement of Undisputed Facts ("Plaintiff's Response to Defendant's Statement") ¶ 6. They are usually given to jewelry purchasers free of charge. Memorandum in Support of Defendant's Motion for Summary Judgment ("Defendant's Memorandum") at 2.

The parties are in accord on the design and material make-up of the boxes. They agree that these are boxes designed to hold jewelry, are made of metal or plastic, and are covered with textile material or plastic sheeting. They further agree that the boxes are designed to display the jewelry in the stores and to hold the jewelry for the consumer from the store to home. Plaintiff's Statement of Additional Material Fact as to Which There Are No Genuine Issues to be Tried ("Plaintiff's Additional Statement") at ¶¶ 4, 6; Defendant's Response to Plaintiff's Statement of Additional Material Fact [sic] as to Which There Are No Genuine Issues to be Tried at ¶¶ 4, 6; Defendant's Statement at ¶ 2; Plaintiff's Response to Defendant's Statement at ¶ 2.

The issue on which they disagree, however, is material to the classification of the merchandise. Plaintiff argues that these boxes are not designed to be reused. Plaintiff's Additional Statement at ¶ 7. Plaintiff argues that although some consumers may indeed retain the boxes and possibly reuse them, this is purely incidental to the intended use of the boxes (display and packaging), and that this is not a factor to consider in classifying the merchandise. Plaintiff's Memorandum at 9.

Customs, on the other hand, contends that the boxes are indeed suitable for long term use, and are actually so used by consumers. However, the Government also does not consider this to be a factor relevant to the classification of these presentation boxes. Defendant's Memorandum at 2 n.4.

III

STANDARD AND SCOPE OF REVIEW

Summary judgment shall issue when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact

and that the moving party is entitled to judgment as a matter of law." USCIT Rule 56(d). See *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48 (1986).

IV

ANALYSIS

Under the General Rules of Interpretation (GRI) and case law, it is possible that the merchandise here at issue may be properly classified under either the subheading claimed by Customs, or the subheadings advocated by Plaintiff. Whether the merchandise is classifiable under the Government's proposed provision hinges on the issue of long term use. The final classification cannot be determined until that issue is resolved.

A

WHETHER THE BOXES ARE CLASSIFIABLE UNDER THE HTSUS 4202.92 DEPENDS UPON WHETHER THE BOXES ARE SUITABLE FOR LONG TERM USE

GRI 1 provides that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *". Gen. R. Interp. 1, HTSUS. Applying GRI 1, the Court finds that the merchandise is classifiable under the Government's proposed tariff provision only if the boxes are suitable for long term use.

The term "jewelry boxes" is not defined in the tariff itself. In the absence of a binding tariff definition or binding legislative history, the Court looks to the common meaning of a term for guidance. In determining the common meaning of a tariff term "the court may rely upon its own understanding, dictionaries and other reliable sources." *Medline Industries, Inc. v. United States*, 62 F.3d 1407, 1409 (Fed. Cir. 1995) (citing *Marubeni Am. Corp. v. United States*, 35 F.3d 530 (Fed. Cir. 1994)).

In the dictionaries cited by the parties and others consulted by the Court, the term "jewelry boxes" is not defined much beyond a box to hold jewelry. *The Illustrated Oxford Dictionary* at 435 (1998) (defining "jewelry box" as "a box in which jewelry is kept"); *Merriam-Webster's Collegiate Dictionary* at 629 (10th ed. 1996) (defining "jewel box" as "a small box or case designed to hold jewelry"); *Random House Webster's College Dictionary* at 726 (1991) (defining "jewel box" as "a small case for jewelry or other valuables"). It is undisputed that the presentation boxes here are designed to hold jewelry and actually do so.

One source has a drawing of a "jewel box," showing the type usually stored on a dresser and used to hold multiple pieces of fine jewelry. *Webster's Third New International Dictionary of the English Language Unabridged* at 1215 (1986) (but only defining "jewel box" as "a small chest designed to hold jewelry"). This is the type of box to which Plaintiff be-

lieves the Government's tariff provision applies.⁴ However, one drawing in one source does not outweigh the simple written definition given in numerous sources. Furthermore, this drawing does not imply that boxes which sit on dressers and hold multiple pieces of jewelry are the only type of boxes known as jewelry boxes. Clearly the spectrum ranging from any box that holds jewelry to chests that hold multiple pieces is broad. The common meaning is therefore not clear to the Court.⁵

At oral argument the Government argued that the analysis should end here. Since the boxes do appear to literally fit the dictionary definition of a box that holds jewelry, they are classifiable under subheading 4202. The Court is unable to reconcile such reasoning with the Explanatory Notes⁶ and, more importantly, with the context of the subheading.

The amended Explanatory Notes state that the term "jewelry boxes," as used in subheading 4202 of the HTSUS, is intended to encompass boxes specifically designed for keeping jewelry, "but also similar lidded containers * * * specially shaped or fitted to contain one or more pieces of jewelry and normally lined with textile material, of the type in which articles of jewelry are presented and sold and which are suitable for long-term use." Explanatory Notes at 661. The Explanatory Notes are intended to aid the Court in interpreting the tariff provisions, but are not binding upon the Court. *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994); *Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992); H.R. Conf. Rep. No. 100-576, 100th Congress., 2d Sess. 549 (1988), reprinted in 1988 U.S.C.C.A.N. 1547, 1582. However, the drafters' inclusion of long term use as a distinguishing characteristic of jewelry boxes classifiable under subheading 4202 indicates to the Court that this factor should be part of the analysis employed here.

Furthermore, the doctrine of *noscitur a sociis* ("associated words") states that "[i]n order to ascertain the meaning of any word or phrase that is ambiguous or susceptible to more than one meaning, the court may properly resort to the other words with which the ambiguous word is associated in the statute." *X-Acto Crescent Products Co., Inc. v. United States*, 27 Cust. Ct. 190, 191 (1951) (quoting Crawford, *The Construction of Statutes* (1940), §190).

Here the term "jewelry boxes" does not have a "well-understood signification" as the term in *X-Acto Crescent* did. See *Id.* As shown above, a jewelry box may be a large chest which holds multiple pieces of jewelry and stands on a dresser. A jewelry box may also be any box which holds a piece of jewelry for some period of time, whether it be short or long. The

⁴ The Government does not dispute that such boxes would be classified under 4202. However, the Government contends that such jewelry boxes are not the only boxes fitting that heading.

⁵ The parties were unable to clarify for the Court the common meaning of jewelry boxes at oral argument.

⁶ The *Harmonized Commodity Description and Coding System, Explanatory Notes* (2d ed. 1996) ("Explanatory Notes") are the official interpretation of the scope of the Harmonized Commodity Description and Coding System (which served as the basis of the HTSUS) as viewed by the Customs Cooperation Council, the international organization that drafted the international nomenclature. Thus, while the *Explanatory Notes* "do not constitute controlling legislative history," they "nonetheless are intended to clarify the scope of HTSUS subheadings and to offer guidance in interpreting its subheadings." *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994) (citing *Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992)). The *Explanatory Notes* are "generally indicative of proper interpretation of the various provisions of the [Harmonized Tariff System] * * *." *Lynteq*, 976 F.2d at 699 (quoting H.R. Conf. Rep. No. 100-576 (1988), reprinted in 1988 U.S.C.C.A.N. 1547, 1582.).

first of these definitions clearly does not encompass the boxes here at issue, while the second does.

Since the term is subject to more than one meaning, we apply the doctrine of *noscitur a sociis* and look to the words with which the term is associated in the tariff. The items listed in subheading 4202 are all intended for reuse. Suitcases, briefcases, cigarette cases, musical instrument cases, and all the others listed therein are items which are used repeatedly. In order for the boxes at issue here to be classified as jewelry boxes in this heading, fitting with the rest of the items in the list, the boxes must be usable on a repeated basis.

Therefore, following the Explanatory Note and the doctrine of *noscitur a sociis*, whether the boxes are *prima facie* classifiable under subheading 4202 depends on whether they are suitable for long term use.⁷

B

THE COURT MUST DETERMINE IF THE BOXES ARE SUITABLE FOR LONG TERM USE BEFORE IT CAN RULE ON THE PROPER CLASSIFICATION OF THE MERCHANDISE

In order to determine whether the presentation boxes are classifiable under the Government's advanced provision, it must be established whether or not the boxes are suitable for long term use. The analysis can go no further without that determination. When considering a motion for summary judgment, the Court is not empowered to weigh the competing evidence of a factual issue. *Anderson* 477 U.S. at 249; *Phone-Mate, Inc. v. United States*, 690 F.Supp. 1048, 1050, 12 CIT 575, 577 (1988), *aff'd* 867 F.2d 1404 (Fed. Cir. 1989) (citing *Yamaha Int'l Corp. v. United States*, 3 CIT 108, 109 (1982)). Therefore, the Court cannot rule on the issue of whether the boxes are suitable for long term use without a trial, so it therefore cannot rule on the proper classification of the merchandise.

⁷ Although not essential to the holding in this case, the Court finds it appropriate to address Plaintiff's argument regarding *Totes, Inc. v. United States*, 18 CIT 919, 865 F.Supp. 867 (1994), *aff'd* 69 F.3d 495 (Fed. Cir. 1992). Plaintiff would have the Court include in its analysis of whether or not these boxes are classifiable under 4202 a discussion of *Totes*. In *Totes* the Court dealt with the classification of trunk organizers under 4202. In its discussion, the Court stated that the organizers fit into subheading 4202 because they were "within the class * * * of articles listed as exemplars in Heading 4202, especially jewelry boxes * * * that serve mainly to facilitate an organized separation, protection, storage or holding of jewelry." 18 CIT at 925; 865 F.Supp. at 872.

Plaintiff would have this Court read that quoted language to mean that only boxes designed to hold multiple pieces of jewelry qualify as jewelry boxes under 4202. Plaintiff's Memorandum at 14. The Court disagrees. The use of the word "or" in *Totes* indicates that the jewelry boxes in 4202 need not have all four of the listed characteristics. If it was necessary that they separate, then the Court understands that the language would indicate that the boxes must hold more than one piece. However, by listing the four characteristics in the alternative, the *Totes* Court merely states that the boxes must do at least one of those things. Therefore, the Court rejects Plaintiff's argument that *Totes* says the jewelry boxes under 4202 must hold multiple pieces of jewelry.

V

CONCLUSION

The Court hereby denies both motions for summary judgment, but further holds pursuant to CIT Rule 56(e)⁸ that the only triable issue of fact is whether the boxes are suitable for long term use. If they are so suitable, then the Government's provision prevails. If they are not, the Plaintiff's basket provisions shall prevail.

(Slip Op. 00-40)

INTERNATIONAL LIGHT METALS, A DIVISION OF MARTIN MARIETTA
TECHNOLOGIES, INC., PLAINTIFF v. UNITED STATES, DEFENDANT

Court No. 95-08-01037

(Dated April 14, 2000)

ORDER

CARMAN, *Chief Judge*: This matter having been remanded by the Court of Appeals for the Federal Circuit in *International Light Metals v. United States*, 194 F.3d 1355 (Fed. Cir. 1999) and in accordance with that opinion, and upon consideration of the submissions of the parties herein; it is hereby

ORDERED that this matter is remanded to the United States Customs Service for:

(1) approval of the revised drawback contract submitted by International Light Metals on June 19, 1989 as directed by the Federal Circuit; and

(2) payment of the drawback refund owed International Light Metals in the amount of \$554,439.91, together with interest on that amount calculated from August 11, 1995 to the date of payment pursuant to 28 U.S.C. § 2644 (1994), as directed by the Federal Circuit; and it is further

ORDERED that the United States Customs Service approve the revised contract and pay all monies due International Light Metals no later than sixty (60) days after entry of this Order.

⁸USCIT Rule 56(e) states:

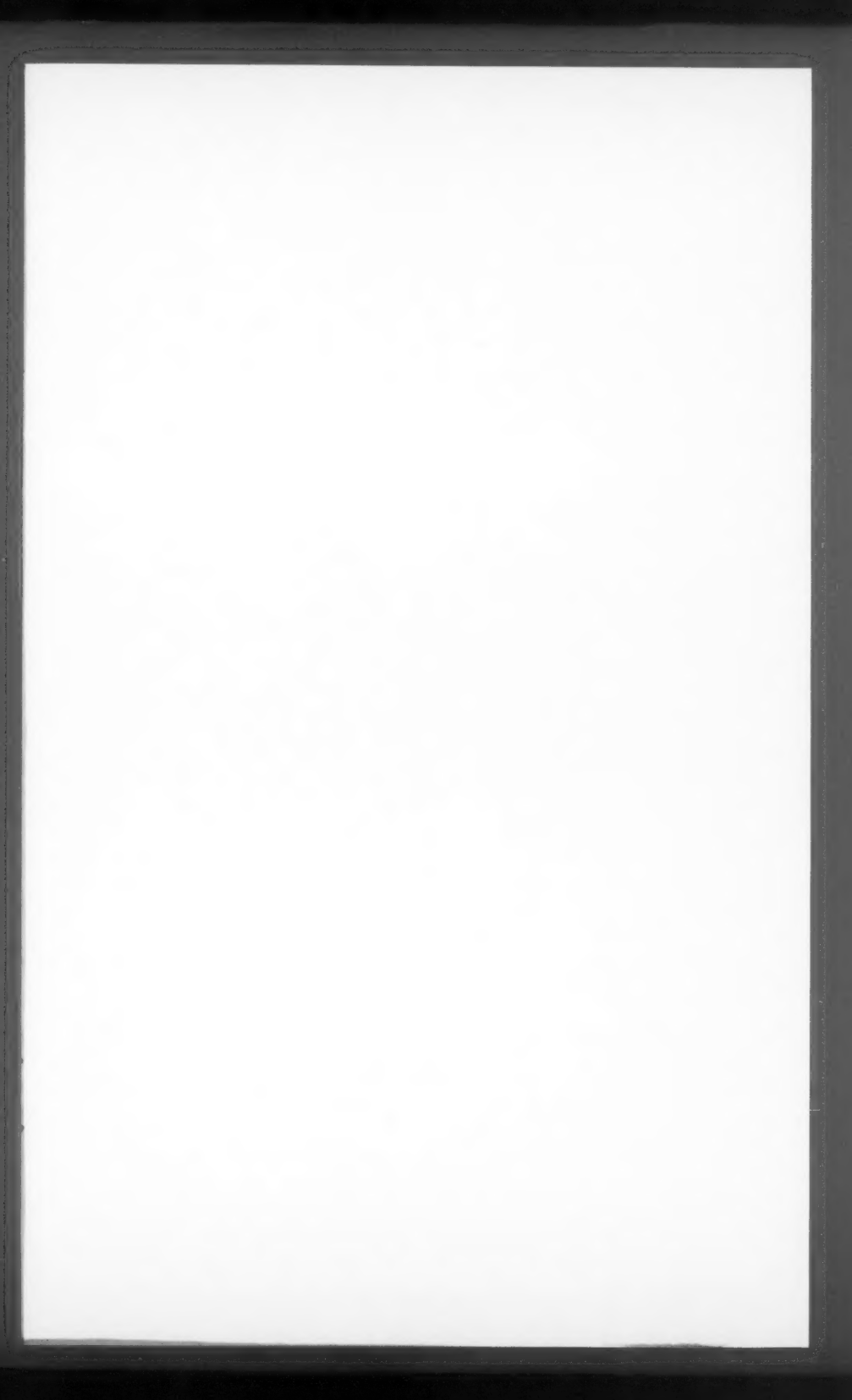
Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

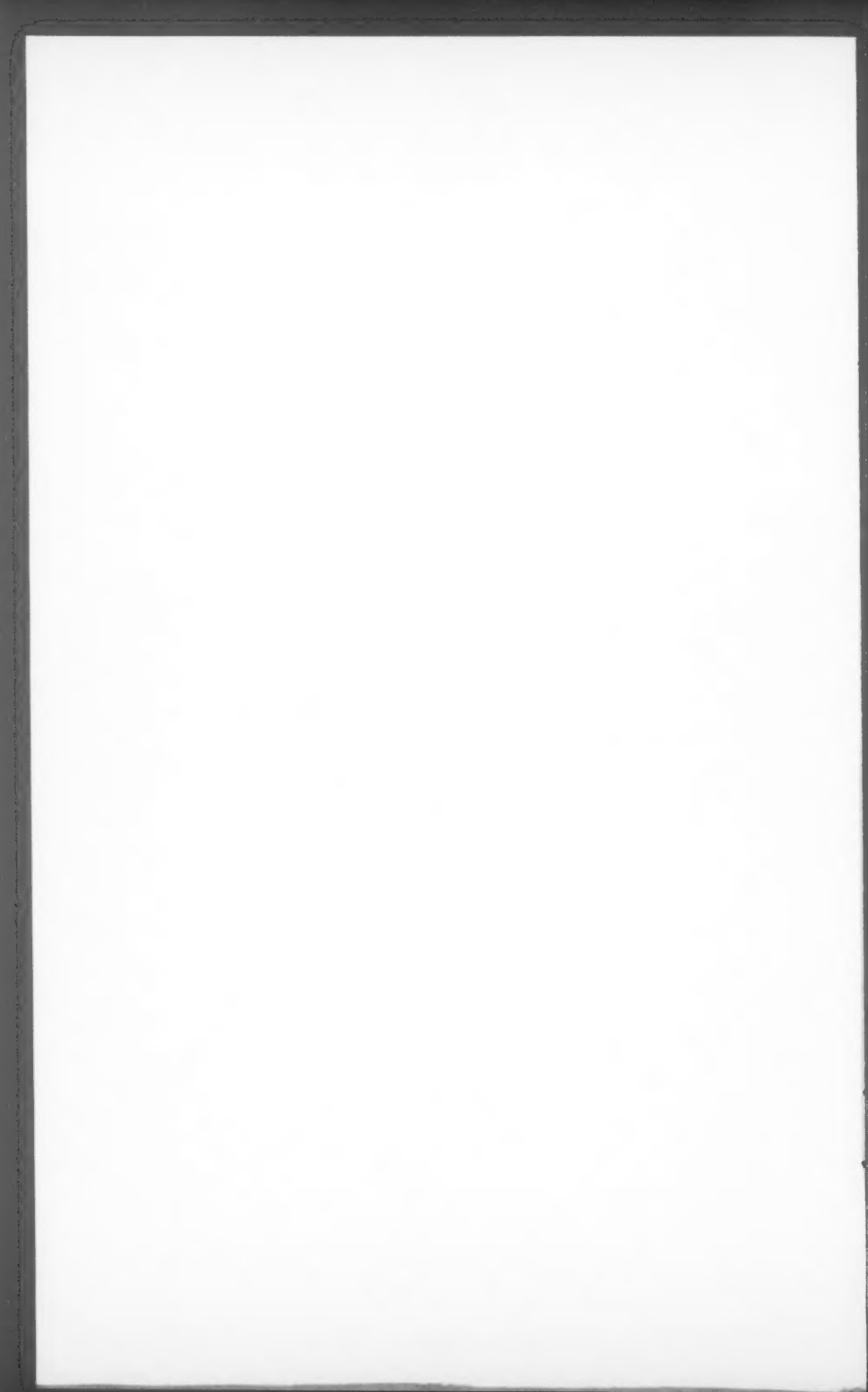
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C00/24 4/10/00 Goldberg, J.	Xerox Corporation	95-04-00616	3707.90.30 8.5%	9009.90.50 3.9% or free 8473.30.40 Free 8473.30.50 Free	Agreed statement of facts	Not stated Parts and accessories of electrostatic photocopiers and laser printers
C00/25 4/10/00 Goldberg, J.	Xerox Corporation	95-09-01227	3707.90.30 8.5%	9009.90.50 3.9% or free 8473.30.40 Free 8473.30.50 Free	Agreed statement of facts	Not stated Parts and accessories of electrostatic photocopiers and laser printers
C00/26 4/10/00 Goldberg, J.	Xerox Corporation	95-11-01507	3707.90.30 8.5%	9009.90.50 3.9% or free 8473.30.40 Free 8473.30.50 Free	Agreed statement of facts	Not stated Parts and accessories of electrostatic photocopiers and laser printers
C00/27 4/10/00 Goldberg, J.	Xerox Corporation	95-02-00426	3707.90.30 8.5%	9009.90.50 3.9% or free 8473.30.40 Free 8473.30.50 Free	Agreed statement of facts	Not stated Parts and accessories of electrostatic photocopiers and laser printers
C00/28 4/10/00 Goldberg, J.	Xerox Corporation	95-03-00877	3707.90.30 8.5%	9009.90.50 3.9% or free 8473.30.40 Free 8473.30.50 Free	Agreed statement of facts	Not stated Parts and accessories of electrostatic photocopiers and laser printers

C00/29 4/10/00 Goldberg, J.	Xerox Corporation	96-06-01538	3707.90.30 8.5%	9009.90.50 3.9% or free 8473.30.40 Free 8473.30.50 Free	Agreed statement of facts	Not stated Parts and accessories of electrostatic photocopiers and laser printers
C00/30 4/10/00 Goldberg, J.	Xerox Corporation	96-10-02371	3707.90.30 8.5%	9009.90.50 3.9% or free 8473.30.40 Free 8473.30.50 Free	Agreed statement of facts	Not stated Parts and accessories of electrostatic photocopiers and laser printers
C00/31 4/10/00 Goldberg, J.	Xerox Corporation	97-01-00009	3707.90.30 8.5%	9009.90.50 3.9% or free 8473.30.40 Free 8473.30.50 Free	Agreed statement of facts	Not stated Parts and accessories of electrostatic photocopiers and laser printers







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